



**SENSE AND SENSITIVITY:
FAMILY LAW, FAMILY VIOLENCE,
AND CONFIDENTIALITY**

Women's Legal Service NSW

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Executive Summary

Women's Legal Service NSW ('WLS NSW') is a community legal centre providing free legal services across NSW to women who are disadvantaged by their cultural, social and economic circumstances.

The majority of the women that WLS NSW works with have experienced domestic and family violence and for more than twenty years WLS NSW has advocated for the protection of sensitive records of victims of violence in criminal, civil and family law jurisdictions.

This paper examines the current climate of increased focus on information sharing, particularly in the context of family law and family violence, and the impact of disclosure of sensitive material on the safety of victims and their children and on the integrity of therapeutic relationships.

In some cases information sharing will lead to more timely and safer outcomes, however an increase in information will not address systemic issues such as delay or inexperience in matters involving family violence. The unintended consequences, including providing perpetrators with additional means to cause harm to victims or to abuse litigation processes and further disrupt the mother and child relationship, are relevant.

Ideally less intrusive options will be exhausted before seeking access to therapeutic records. In examining the explicit statutory protections for family dispute resolution and family counselling records a consistent approach to determining access to sensitive material in family law regardless of the source of the therapeutic records appears preferable.

The family law system must take a broader responsibility for victim parents by preserving the confidentiality of therapeutic relationships to allow the best possible opportunity for victims to recover without further incursions on their capacity to care for their children.

Proposals include:

- Utilise victim centric practices, which encourage obtaining informed consent before sharing information and improved responsiveness to disclosures.
- Provide guidance on improving the quality of primary evidence about family violence, including the impact on parenting capacity, to reduce reliance on third party records.
- Develop guidelines and training for the judiciary and family law professionals about the potential impact of access to therapeutic records.
- Adopt a least intrusive approach when issuing subpoenas for therapeutic records, including a rebuttable presumption that disclosure always creates potential for a detrimental impact on the therapeutic relationship.

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Part 1 WLS NSW observations and objectives

Introduction

Women's Legal Service NSW ('WLS NSW') is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. WLS NSW provides a range of free legal services in the areas of domestic and family violence¹, sexual assault, family law, care and protection, victims support, discrimination and employment, human rights and access to justice.

WLS NSW works with women who are disadvantaged by their cultural, social and economic circumstances and are seeking equitable access to legal services. Services are prioritised for Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women with disabilities, women who have experienced domestic and family violence, women in prison and women who reside in geographic areas of high disadvantage and high legal need.

WLS NSW advice and casework services are predominantly provided in partnership with external agencies such as Women's Health Centres, Family Relationship Centres (FRCs), Aboriginal Community Centres, Local Courts, Legal Aid and Corrective Services. As a statewide service WLS NSW also has extensive experience in identifying and responding to the legal needs of women in rural and remote areas of NSW.

In doing this work WLS NSW has identified systemic barriers for victims of family violence in family law.² This paper examines the treatment of sensitive records and confidentiality in family law matters.³ It draws on WLS NSW experiences and expertise in assisting women during family dispute resolution (FDR) and litigation. It also incorporates WLS NSW work with the therapeutic and support services that assist women experiencing family violence.

WLS NSW and family law

The majority of WLS NSW work involves complex family law issues, with an intersection of family law, child protection, criminal law and victims support jurisdictions. Clients in these matters require safe, appropriate support services and responses, which acknowledge the gendered nature of violence and exercise caution to ensure that perpetrators of violence do not manipulate legal processes to obscure or perpetuate the violence. Unfortunately many of

* A version of this paper was circulated for external comment in late 2015 and the final version incorporates the feedback received.

¹ WLS NSW uses the terms 'domestic' and 'family' violence interchangeably, but acknowledges that domestic violence typically refers to intimate partner violence and family violence refers to acts committed by a wider range of family members.

² WLS NSW acknowledges that some people prefer to identify as victims of violence and others as survivors of violence. When WLS NSW uses the term 'victim' this is intended to mean both victims and survivors.

³ WLS NSW uses the terms 'sensitive records' and 'therapeutic records' interchangeably, but acknowledges that 'sensitive records' may be used to refer to a broader range of material including, but not limited to, sexual health information, genetic information, details of racial or ethnic origin, sexual orientation and gender identity.

the women that WLS NSW assist report that they have not received this kind of support and protection at key stages of their contact with the legal system.

WLS NSW has extensive experience in the provision of legally assisted FDR in a range of FDR environments where domestic and family violence, including sexual assault, child abuse and other complexities, are a factor.

WLS NSW provides advice and representation to women engaged in FDR, primarily through the Blacktown and Penrith Family Relationship Centres, but also through other FRCs, Legal Aid, the Telephone Dispute Resolution Service, private Family Dispute Resolution Practitioners (FDRP) and court ordered mediation.

Victims of family violence and access to family dispute resolution

In WLS NSW experience many victims of family violence instruct that they do not want to go directly to court and that with appropriate support they wish to attempt to reach an agreement about arrangements for their children in FDR. Such support could include each party having to work with both a support worker and a lawyer during the FDR process and the option to elect to proceed face to face or via a shuttle conference.⁴

However, many victims are being denied this opportunity as the FDRP assesses the matter as inappropriate for FDR because of the violence and presumably because there is not a family violence informed model of FDR available as an alternative. WLS NSW acknowledges that the presence of domestic and family violence raises safety and ethical issues and is aware that some mediators take the position that there is no place for negotiation where this is a power difference. However victims of violence should have equal access to safe family violence informed FDR, as there can be child focused, safety, strategic and cost advantages in not going straight to court.⁵ There are also clear benefits to accessing the supportive services and referrals offered by FRCs as opposed to being forced to go directly to court, potentially without a lawyer or other assistance.⁶

⁴ A shuttle conference can be conducted in various ways, for example, parties in separate rooms and the FDRP travels between the rooms and provides each party with an account of what the other party has said; parties in separate rooms and the FDRP is instructed by each party about what they can say to the other party and then this occurs via a speaker phone or all parties and the FDRP using a telephone. WLS NSW has experienced resistance to requests for shuttle arrangements and holds concerns that vulnerable unrepresented parties may not always be able to advocate for safer arrangements such as shuttle conferences.

⁵ The Women's Legal Services Australia *Safety First in Family Law 2016* campaign advocates for a mediation model with specialist domestic violence lawyers and social workers: <www.wlsa.org.au/media_releases/wlsa_launches_5_step_plan_to_keep_women_and_children_safe_in_family_law/> accessed 11 May 2016.

⁶ Court support options for victims are very limited in family law registries. For example, after being forced to close in September 2015 the Women's Family Law Support Service at the Sydney Family Law Courts Registry received an additional 12 months of funding from the NSW Government in March 2016, but longer term funding remains a critical issue. See further Laing, L., *They Should Have this in Every Court: Evaluation of the NSW Women's Refuge Movement Women's Family Law Support Service* (The University of Sydney 2011); Parliament of New South Wales Hansard 10 March 2016 <www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-69049> accessed 13 May 2016; In examining the experiences of Aboriginal and Torres Strait Islander

This issue is extensively considered in the Australian Institute of Family Studies (AIFS) *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases*.⁷ The AIFS evaluation acknowledges that this is a task of some significant difficulty involving complex and vulnerable clients and the challenges of interdisciplinary collaborative practice, but one with clear merit. WLS NSW encourages a genuine commitment from government to develop and resource a model of FDR that is appropriate for matters involving family violence, focused on safety, which assists the parties to identify their key concerns and achievable outcomes.

In advocating for a safe family violence informed approach to FDR WLS NSW acknowledges that the presence of risk, urgency and trauma will always necessitate some matters proceeding straight to court. There must be a nuanced safety and risk assessment on a case by case basis. It is also noted that participation in FDR may expose victims to greater invasions of privacy and increased risk if their matter subsequently ends up in court given the uncertainty about when FDR begins and ends, which is discussed in more detail below.

WLS NSW and sensitive records

Sexual Assault Communications Privilege

WLS NSW has consistently advocated for the preservation of the integrity of counselling and therapeutic relationships, which includes recognising that counselling records do not have an investigative or forensic purpose. In 1996 WLS NSW co-authored *Counsellors and Subpoenas: A Practical Guide for Counsellors Served with Subpoenas* in response to the growing practice of the issue of subpoenas for sexual assault counselling notes in sexual assault trials.⁸

In 1997 legislation was introduced into NSW to protect the counselling communications of sexual assault complainants. The sexual assault communications privilege (SACP) limits the disclosure and use of a broad range of counselling and therapeutic records in criminal, apprehended violence order (AVO) and limited civil proceedings. The SACP recognises the public interest in victims having access to confidential counselling as a therapeutic response without the threat of disclosure of records. Such disclosure would act as a deterrent to other complainants reporting sexual violence.⁹

and Migrant and Refugee women the Judicial Council on Cultural Diversity has recommended that all Australian courts should give priority to separate waiting areas for women attending court for family violence and sexual assault matters to assist in alleviating stress at court: Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experiences of the Courts* (Report 2016) 28, 39 and Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experiences of the Courts* (Report 2016) 53.

⁷ Kaspiew, R., De Maio, J., Deblaquiere J. and Horsfall, B., *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases* (Australian Institute of Family Studies, Dec 2012).

⁸ WLS NSW as a member of the NSW Working Party Concerning the Confidentiality of Counsellor's Notes, *Counsellors and Subpoenas: A Practical Guide for Counsellors Served with Subpoenas*, 1996. This publication was revised by WLS NSW in 2004 and will be published in 2016 in a new format in collaboration with Legal Aid NSW: *Subpoena Survival Guide: What to do When a Court Wants Confidential Client Information*.

⁹ See *KS v Veitch (No 2)* [2012] NSWCCA 266 in which the NSW Court of Criminal Appeal states while discussing SACP: 'The purpose of protecting such confidences generally is to encourage victims of sexual assault to seek

Unsurprisingly there have been various attempts to weaken the SACP protection by defence advocates, such as arguments that it does not apply to material produced on subpoena or that it only protects communications made to 'expert' counsellors. WLS NSW also observed that there were limited resources available to assist protected confiders to object to the production of records.

Between February 2009 and February 2010 WLS NSW initiated and coordinated the Sexual Assault Communications Privilege Pilot Project (the SACP Project). The SACP Project addressed the growing concern about the lack of legal services for sexual assault victims seeking to protect the confidentiality of their counselling notes and the consequent unnecessary and inappropriate disclosure of these records.

The SACP Project established a pro bono referral process for sexual assault victims involved in matters in Sydney's central Downing Centre courts and ultimately resulted in the establishment of the Sexual Assault Communications Privilege Service (SACP Service) within Legal Aid NSW in 2012. The SACP Service continues to provide advice and representation for criminal and AVO cases in NSW, and some civil matters.

Both the introduction of the legislation in 1997 and the establishment of the SACP Service in 2012 clearly evidence an ongoing commitment to protecting victims of violence from the further harm that may arise if their records are disclosed, especially to a perpetrator.

Subpoenas in family law and child protection matters

WLS NSW provides support to counsellors and other service providers when they are issued with subpoenas in family law and child protection matters.

WLS NSW assists by providing advice about issues such as the purpose and scope of the subpoena, how to comply and how to object. WLS NSW also delivers education and training on record keeping practices and preparing evidence for court.

WLS NSW has observed that many sexual assault services, women's health centres and other counsellors rarely object to the production of sensitive counselling and therapeutic records in family law and child protection matters, despite a desire by the client and/or the service provider to do so. This is largely due to a lack of knowledge or fear of the legal process, the complexities that can arise from the broad discretion available when the best interests of the child is the paramount consideration and limited resources to attend court events to speak to the objection. For example, a private counsellor or therapist would have to give up at least part of a day of work to attend court. This is compounded if the service is not located near the relevant court registry.

WLS NSW advocates for the establishment of a service, similar to the SACP Service, to provide advice and representation in family law and child protection matters for individuals and services wishing to object to subpoenas of sensitive records.

professional assistance..' [34] and 'The deterrent effect on others through a perception that disclosure is readily achieved, may undo the purpose of the statutory privilege' [77].

Objectives

The purpose of this paper is to:

- Examine the practices and consequences of information sharing;
- Highlight the difficulties that arise from a lack of consensus about which potential evidentiary material is confidential and inadmissible;
- Explore the unintended consequences of disclosure of sensitive material;
- Examine the competing public interests in obtaining relevant evidence, particularly the paramountcy of the best interests of the child, and preserving the confidentiality of the therapeutic relationship;
- Encourage the development of a consistent approach to the exercise of broad judicial discretion to provide equivalent protections regardless of the source of the sensitive material;
- Encourage input from a range of professions and stakeholders; and
- Energise the development of guidelines and training to assist the judiciary and legal practitioners to emphasise safety and to balance competing priorities when considering access to sensitive records.

Part 2 Law and opinions

Information sharing

Efforts to improve responsiveness to disclosures of family violence are welcomed, but domestic violence service provision is a 'complex field within which victims' needs for safety, recovery and ongoing support are influenced by multiple, changing factors'¹⁰ and information sharing in this context requires careful consideration.

There is increasing attention on enhancing collaboration and information sharing in the Australian family law system, including exchange of information between the family courts and services addressing complex issues such as family violence, child protection, mental ill health and substance abuse. Analysis of confidentiality in family law is often focused on information sharing between family courts and family relationship services and particularly on the provisions in the *Family Law Act 1975* (FLA) dealing with the confidentiality and

¹⁰ Breckenridge, J. and Hamer, J., Traversing the Maze of 'Evidence' and 'Best Practice' in Domestic and Family Violence Service Provision in Australia (Australian Domestic & Family Violence Clearinghouse Issues Paper 26 May 2014) 2, referring to Laing, L., Humphreys, C. and Cavanagh K., *Social Work and Domestic Violence: Developing Critical and Reflective Practice* (Sage, London, 2013).

inadmissibility of communications made in family counselling and FDR.¹¹ This issue has also been the subject of key reports, for example, in 2010 the Australian and NSW Law Reform Commissions' report on Family Violence discussed information sharing, confidentiality and admissibility in family law with a predominant focus on FDR and family counselling.¹²

Additionally in the context of a broader interest in information sharing, the Commonwealth Attorney General in late 2014 requested that the Family Law Council report on the opportunities for family relationship services and court processes to improve responses to families with complex needs, particularly those involved with both the child protection and family law systems.¹³ Submissions were sought on opportunities to enhance information sharing within the family law system and with relevant support services, with a specific question on how the exchange of information between family courts and family relationship services could be conducted in a manner that maintains the integrity of therapeutic service provision.¹⁴ The work of the Family Law Council is informed by the reports of Richard Chisholm addressing information sharing between the family law and child protection systems.¹⁵

The Family Law Council has published their Interim Report on the first two terms of reference.¹⁶ The Interim Report canvases some aspects of information sharing, largely in connection with the sharing of family reports and expert reports and the impact of the section 121 FLA restrictions with a focus on improving the exchange of information between family courts and children's courts.¹⁷

¹¹ *Family Law Act 1975* (Cth) ss 10D, 10E, 10H, 10J; for example *Smirnov & Turova* [2009] FMCAfam 1083, *Kidd & London* [2011] FMCAfam 1084, *Wenlack & Cimorelli* [2013] FamCA 602 and *Hopkins & Hopkins* [2015] FCCA 1200 on the scope of 'family counselling'; *Roux & Herman* [2010] FMCAfam 1396 on whether FDR includes the parenting plan agreement reached at the end of the process; *Unitingcare - Unifam Counselling & Mediation & Harkiss and Anor* [2011] FamCAFC 159 on family counsellors retaining discretion not to disclose records even if the parties consent to disclosure; *French & Winter* [2012] FMCAfam 256 on whether it is FDR if the party perceives the service to be counselling.

¹² The Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence - A National Legal Response*, ALRC Report No 114, NSWLRC Report 128 (2010).

¹³ 'Family Law Council terms of reference' (*Attorney-General's Department*, October 2014)

<www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCounciltermsofreference.aspx> accessed 16 Feb 2015.

¹⁴ The deadline for submissions on this issue was 30 September 2015, Family Law Council terms of reference - call for submissions information:

<www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCounciltermsofreference.aspx> accessed 31 Aug 2015.

¹⁵ Chisholm, R., *Information-Sharing in Family Law and Child Protection: Enhancing Collaboration* (Report, Attorney-General's Department, March 2013); Chisholm, R., *The Sharing of Experts' Reports Between the Child Protection System and the Family Law System* (Report, Attorney-General's Department, March 2014).

¹⁶ Family Law Council, *Interim Report to the Attorney-General In Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, June 2015.

¹⁷ Family Law Council (2015) 87-89; See also Commonwealth of Australia, Department of the Prime Minister and Cabinet, COAG Advisory Panel on Reducing Violence against Women and their Children Final Report (2016) 106-108, 116-117, which advocates for an integrated service response to family violence to minimise secondary victimisation, including improved information sharing governed by an ethical framework and clarity and transparency around privacy laws.

A similar emphasis on information sharing is also occurring in many state contexts, largely in an attempt to facilitate more timely and appropriate responses to family violence and child abuse through information sharing. For example, the *Finding into Death with Inquest for Luke Geoffrey Batty* includes a recommendation that:

'4...the State of Victoria identify legislative, or policy impediments to the sharing of relevant information, and remove such impediments, so that all agencies, including the Magistrates' Court of Victoria, operating within the integrated family violence system, are able to share relevant information in relation to a person at risk of family violence.'¹⁸

The Royal Commission into Family Violence in Victoria has also made comparable recommendations including:

'Recommendation 5 The Victorian Government amend the *Family Violence Protection Act 2008* (Vic) to create a specific family violence information-sharing regime...

Recommendation 6...identify priority areas for the development of an information sharing culture throughout the family violence system...

Recommendation 9 The Victorian Government examine options for the development of a single case-management data system to enable relevant agencies to view and share risk information in real time.

Recommendation 134...the creation of a single database for family violence, child protection and family law orders, judgments, transcripts and other relevant court documentation that is accessible to each of the relevant state, territory and Commonwealth courts and other relevant agencies as necessary...

Recommendation 136 The Magistrates' Court of Victoria and the Children's Court of Victoria consider pursuing a formal information-sharing arrangement or protocol with the Family Court of Australia and the Federal Circuit Court of Australia that is consistent with the new information sharing regime in the *Family Violence Protection Act 2008* (Vic)...'¹⁹

In 2014 a new Part 13A was introduced into the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which allows agencies and services to share relevant information about victims and perpetrators in clearly defined circumstances to enhance a more coordinated approach to service delivery.²⁰ Pursuant to the NSW legislation a *Domestic Violence Information Sharing*

¹⁸ *Finding into Death with Inquest for Luke Geoffrey Batty*, Coroners Court of Victoria 28 September 2015, Recommendation 4.

¹⁹ State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations*, Parl Paper No 132 (2014-16).

²⁰ See also the *Family Violence Act 2004* (Tas) s 37 (facilitates information sharing between court support, counselling services, prosecutors and Legal Aid); *Restraining Orders Act 1997* (WA) s 70A (enables cross-agency information sharing where necessary for safety of protected person or a child); *Intervention Orders (Prevention of*

Protocol (Protocol) has been developed to explain how to share information under Part 13A.²¹ The Protocol clearly states that it is best practice to obtain consent from the victim to share personal and health information.²² Information can also be exchanged without consent where there is a serious domestic violence threat.²³

Curbing enthusiasm

It is tempting to view information sharing as a panacea. While it is effective in some cases, it is vital to consider the limitations to the quality of the information and to challenge assumptions that coordination automatically improves outcomes for victims. For example, many victims do not report their experiences of violence until they come into contact with the family law system and therefore do not have contemporaneous, independent supporting evidence of the violence they have experienced.²⁴ Or they have been unsuccessful in obtaining a safe and appropriate response from the police or child welfare services or the courts that issue protection orders and this is subsequently interpreted as indicating a lower level of risk for the victim and children or undermines the victim's credibility. Or the perpetrator has carefully manipulated the available evidence to include an array of false allegations about the victim harming the children or experiencing symptoms of serious mental health and this obscures or undermines responses. Or the victim downplays their fears to authorities because they may be resilient or scared or polite or embarrassed or don't want to make a fuss or want to protect the perpetrator or their children.²⁵ Or service providers edit the information they record in anticipation that it may be shared, which may be an attempt to protect the client from disclosure of sensitive material or to limit the potential liability of their employer, but may then be open to misinterpretation. Those receiving shared information must be trained and resourced to identify and respond appropriately to all these potential dynamics that can occur when family violence is a factor.

Abuse Act 2009 (SA) s 38 (requires public agencies to disclose information to assist police in locating perpetrators); *Domestic Violence Agencies Act 1986 (ACT) s 18* (allows police to share information with crisis support organisations) as discussed in Wilcox, K., 'Privacy, Information Sharing and Coordinated Practice: Dilemmas for Practice' (2010) 42 *Australian Domestic and Family Violence Clearinghouse Newsletter* 8.

²¹ NSW Department of Justice, *Domestic Violence Information Sharing Protocol*, Sept 2014, made under s 98O *Crimes (Domestic and Personal Violence) Act 2007*.

²² NSW Department of Justice, *Domestic Violence Information Sharing Protocol* 43.

²³ *Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 98M*, which permits dealing with information without consent if there are reasonable grounds to believe that this will prevent or lessen a serious domestic violence threat where there has been a refusal to give consent or it is unreasonable or impractical to obtain consent. This section removes the previous requirement for the threat to be both serious and imminent. See also NSW Department of Justice, *Domestic Violence Information Sharing Protocol* 48.

²⁴ It is estimated that only one in ten intimate partner assaults are reported to police: Roberts, D., Chamberlain, P. and Delfabbro, P., *Women's Experiences of the Processes Associated with Family Court of Australia in the Context of Domestic Violence: A Thematic Analysis* (2014) *Psychiatry, Psychology and Law* 2; For more on barriers to reporting family violence see COAG Advisory Panel on Reducing Violence against Women and their Children (2016) 40; Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experiences of the Courts* (2016) 16; Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experiences of the Courts* (2016) 18.

²⁵ Research shows that many women minimise or deny the violence they have experienced and underestimate the impact on children witnessing the violence: Roberts, Chamberlain and Delfabbro (2014) discussing the work of Graham-Bermann and Levendosky 1.

It is equally important to continually assess what is done with the information and to be clear about what information will be shared and when and who will see it. If a victim provides informed consent to share information they must have a clear understanding of exactly what information will be shared. Also risk is not static and consent may need to be obtained each time a victim's circumstances change, including when a referral is made to a new agency.²⁶

Services must also be in a position to use the information in an effective way, which will require a genuine and ongoing commitment to resourcing responses to family violence that are proven to assist victims to escape violent relationships and live their lives free of persistent harassment by the perpetrator. This will include challenging pervasive community attitudes that reinforce gender inequality and social norms that support violence against women²⁷, holding perpetrators accountable for their actions and a clear delineation of roles and responsibilities to ensure that sharing information does not result in services assuming that someone else is now responsible for assisting the victim.

Confidentiality in family law

WLS NSW believes that there has been a narrow examination of safe, respectful and effective information sharing in the family law context. There also appears to be an arbitrary distinction in the protections offered based on the source of the sensitive information.

It is clearly important to have the benefit of all relevant material to assist in making decisions in the best interests of the child, and early decision making is essential if safety is at stake. However the potential consequences of breaching the confidentiality of therapeutic relationships must also be considered. Therefore information sharing practices in family law must address the tension between a long-standing acceptance of counselling and mediation as necessarily confidential and the legal tradition that courts require access to all relevant evidence.²⁸

Each position may have merit depending on the facts of the individual case, but there is a concerning lack of consistency in the current approach to dealing with confidential material within the family law system.

²⁶ WLS NSW clients have disclosed fear and shame after learning that their personal information has been or may be shared with other agencies without their express consent. This can be an even more significant issue for victims in rural areas and for people from Aboriginal and Torres Strait Islander or culturally diverse communities as there is a significantly increased likelihood that they or the perpetrator may be known to a local or specialist service provider, which can elevate risk and cause significant embarrassment; The Judicial Council on Cultural Diversity notes the particular difficulties in maintaining confidentiality in new and emerging communities: Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experiences of the Courts* (2016) 34.

²⁷ The COAG Advisory Panel on Reducing Violence against Women and their Children has identified six areas for action with the first being national leadership to challenge gender inequality and transform community attitudes: COAG Advisory Panel on Reducing Violence against Women and their Children (2016) viii, 22-38.

²⁸ As discussed in Chisholm, R., 'Confidentiality and "Family Counselling" Under the Family Law Act 1975) in Alan Hayes and Daryl Higgins (eds), *Families, Police and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 185; Jones, A., 'Maintaining Confidentiality Between Sexual Assault Complainants and Their Counsellors' (1996) (November) *Women Against Violence: An Australian Feminist Journal* 29.

In order to gain some understanding of the complexity of access to confidential material in the family law system it is useful to consider current debate about the confidentiality and admissibility of FDR and family counselling communications.

Defining family dispute resolution

The FLA protects communications made to 'family counsellors' and 'FDRPs' while 'family counselling' or FDR is being conducted.²⁹ A key issue for the courts has been determining when the FDR process begins and ends and therefore what will and will not be protected under the FLA³⁰. Case law indicates that the FLA protection does not extend to communications made at the intake stage of FDR,³¹ and there is opinion that it is likely that the intake stages of family counselling are similarly not protected.³²

WLS NSW has observed that the experience of the FDR process can also vary greatly depending upon the FDR service provider.³³ For example, FRC clients may be involved in any number of combinations of:

- Initial intake, screening and assessment by an intake worker;
- Compulsory attendance at different groups to develop an understanding of the FDR process and to encourage parents and caregivers to adopt a focus on the best interests of the child;
- Referral for legal advice;
- Referral to support and counselling before further steps are taken at the FRC;
- Child inclusive practice (CIP);
- Cultural needs consultation or assessment;
- Pre dispute resolution assessment by a FDRP;

²⁹ These terms are defined in the *Family Law Act 1975* (Cth) ss 10B, 10C, 10F and 10G and the protections are outlined in ss 10D, 10E, 10H, 10J.

³⁰ Chisholm, 'Confidentiality and "Family Counselling" Under the Family Law Act', (2014); see also *French & Winter* [2012] FMCAfam 256 where FM Demack considered whether FDR has to include more than one person in circumstances where the FDRP believed they were providing FDR services and the party thought they were receiving counselling. Her Honour found that the FDRP could rely on section 10H FLA and not disclose the communications, stating '...it would seem fair to consider that dispute resolution may be a process with a number of parts and that early contact or intervention with one person may be a necessary precursor to engagement with the other party or any joint session.' [27].

³¹ *Rastall v Ball & Ors* [2010] FMCAfam 1290; *Holden & Holden* [2015] FCCA 788.

³² Chisholm, 'Confidentiality and "Family Counselling" Under the Family Law Act', (2014) 192-194.

³³ For example, the Australian Government funds 65 FRCs across Australia. Many different organisations were selected to manage the individual FRCs, such as Relationships Australia, UnitingCare Unifam, Anglicare, Centacare and Interrelate. The Attorney-General's Department has produced a range of guidelines for FRCs, however in WLS NSW experience there is great variety in the actual pathway for clients engaging in FDR offered by the various organisations. Guidelines and processes can be found here: www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Pages/Familyrelationshipcentresources.aspx accessed 3 Sep 2015.

- Ongoing risk assessment by intake workers, who may stay involved throughout the FRC process for support and referral; by FDRPs and by external partners such as legal representatives, who may also collaboratively assess the level of risk with the consent of the relevant party;
- One or more joint FDR sessions, which may involve a co-mediator model, which can also be gender balanced;
- One or more joint FDR sessions with legal assistance;
- The provision of a typed summary of any agreement reached (not a parenting plan);
- The provision of a parenting plan and in some cases preparation of consent orders if there has been legally assisted FDR.

The FDR pathway can also vary for FRCs operated by the same organisation, but in different locations. Additionally the process of FDR at a FRC can take many months and in some cases more than a year, particularly if the parties are supported to attend multiple FDR sessions to allow time for incremental or laddered parenting arrangements to be trialled and reviewed. WLS NSW has found that a series of FDR sessions, particularly with all parties legally represented, can be very beneficial to allow victims of violence and abuse, including children, time to access therapeutic services, re-establish themselves and test proposals before making a final decision about arrangements in the best interests of the child.

In comparison, a FDR process conducted as a Legal Aid Conference may only involve an initial assessment by a Conference Organiser and then the joint FDR session. FDR conducted by a private FDRP may have an even more limited intake process, and WLS NSW are aware of private FDR sessions where the only safety and risk assessment was an initial question like: 'Are there any reasons we can't proceed with the joint session today?'

Victims of violence may therefore have had a vastly different experience of the family law system well before their matter ends up in court, which may also then impact the information that is available to the court. This can lead to unsafe, unfair and inconsistent outcomes.

Extending confidentiality and inadmissibility

One option is to clearly extend the safeguards of confidentiality and inadmissibility to the intake assessment stages of FDR and family counselling.³⁴ This position reflects widespread opinion that confidentiality is fundamental to the effective provision of mediation and counselling.³⁵ Though it is noted that mediation and therapeutic services provide varied

³⁴ See Harman, J., 'Confidentiality in Family Dispute Resolution and Family Counselling: Recent Cases and Why They Matter' (2012) 17(3) *Journal of Family Studies* who raises concerns that despite no specific statutory distinction for intake in family counselling, decisions such as *Smirnov & Turova* [2009] FMCAfam 1083 could be used to argue that there is a separate intake stage of family counselling, which would not be protected 212; Mathew (2011).

³⁵ See for example, ALRC Report No 114, NSWLRC Report 128 (2010); Harman (2012) 204; Mathew, E., 'Viewpoint: Concerns About the Limits of Confidentiality in FDR' (2011) 17 (3) *Journal of Family Studies* 213; Chisholm, 'Confidentiality and "Family Counselling" Under the Family Law Act', (2014); Simon, R.A. and Willick, D.H., 'Therapeutic Privilege and Custody Evaluations: Discovery of Treatment Records' (2016) 54(1) *Family Court Review* 54; Brown, K.L., 'Confidentiality in Mediation: Status and Implications' (1991) 1991(2) *Journal of Dispute Resolution* 307; Pyles, M., *Mediation Confidentiality* <www.acica.org.au/downloads/mediation_confidentiality.doc> accessed 8 Jul 2015; Charlton, R., *Dispute Resolution Guidebook* (Sydney Law Book Company, 2000); Kochanski, L., 'Family

assistance and are likely to have differing obligations in relation to confidentiality with respect to purpose and profession. However all practitioners require certainty so they can inform clients about which aspects of their service are protected to ensure that clients are not relying on a false sense of confidentiality.³⁶

The distinction between FDR and FDR intake arises from the wording of sections 10H and 10J FLA, which provide that communications are only protected if they are received while the FDRP is 'conducting family dispute resolution'. Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* instructs FDRPs to be satisfied that an assessment has been made that FDR is appropriate before FDR is conducted under the FLA. This has been interpreted as requiring a separate intake step before FDR commences.³⁷ Further evidence for a separate intake stage is taken from the requirement contained in section 60I(8)(aa) FLA that a section 60I certificate, which exempts parties from undergoing FDR, be issued to show that a:

...person did not attend family dispute resolution...because the practitioner considers...that it would not be appropriate to conduct the proposed family dispute resolution.³⁸

An analysis of case law which has interpreted the FLA FDR provisions to include a separate, unprotected intake step, has been expressed to be a threat to undermine FDR 'without any real gain as regards to obtaining further reliable evidence' and recommendations made for one or both of the following amendments:

1. The definition of FDR in section 10F and in regulation 25 be amended to expressly include assessment or 'intake' as part of the FDR process; and/or
2. Section 10J be amended to make clear that inadmissibility is attracted by both assessment for suitability for FDR and the FDR process.³⁹

These recommendations have been supported elsewhere in the literature.⁴⁰

Dispute Resolution: The Importance of Intake' (2011) 1(3) *Family Law Review* 164; Levy, L., Galambos, G and Skarbek, Y., 'The Erosion of Psychiatric-Patient Confidentiality by Subpoenas' (2014) 22(4) *Australian Psychiatry* 332; Duncan, R.E., Williams, B.J. and Knowles, A., 'Breaching Confidentiality with Adolescent Clients: A Survey of Australian Psychologists about the Considerations that Influence Their Decisions' (2012) 19(2) *Psychiatry, Psychology and Law* 209.

³⁶ Chisholm, 'Confidentiality and "Family Counselling" Under the Family Law Act', (2014); Hardy, S. and Rundle, O., *Mediation for Lawyers* (CCH 2010) 169 referring to the recommendation by the National Alternative Dispute Resolution Advisory Committee for greater clarity and consistency in relation to confidentiality across the different jurisdictions; Levy, Galambos and Skarbek (2014) concluding that '...the Commonwealth should engage the States and Territories with a view to formulating appropriate, uniform legislation that is consistent with the Statement of Principle of Psychiatrist-Patient Privilege 336.

³⁷ *Rastall v Ball & Ors* [2010] FMCAfam 1290; *Holden & Holden* [2015] FCCA 788 where Judge Harman states in relation to the intake records of a FRC: 'As indicated above it is open to the husband to subpoena the records of Relationships Australia as regards that which passed between he and that organisation. In light of the specific drafting of the relevant regulation such administrative and intake appointments are not protected by the inadmissibility provisions of Part II of the Act.' [220].

³⁸ *Family Law Act 1975* (Cth) s 60I(8)(aa).

³⁹ Harman (2012) 210, 212.

There is also opinion that intake is critical to successful FDR and confidentiality is crucial to conducting intake effectively.⁴¹ Intake is where information is gathered about parties so that the FDR provider can assess the appropriateness of FDR and make decisions about how FDR will be conducted safely. Without an assurance of confidentiality at the initial stage, it is less likely that clients will trust the process and consequently may be reluctant to make relevant disclosures, such as the presence of family violence.⁴² Many FDR clients have experienced trauma, and '...to deny safety of confidentiality to traumatised clients and to therefore compromise their freedom of expression is likely to have significant consequences.'⁴³

WLS NSW is also of the view that intake may occur throughout a client's contact with the FDR provider and should not be perceived as a discrete initial step. This can particularly be the case for victims of family violence who may disclose relevant details of risk and harm incrementally as they test the reactions of the service provider and monitor their own comfort and safety levels. It is confusing to only provide an assurance of confidentiality for part of the FDR process.

Additionally FDRPs that WLS NSW work with state that information contained in FRC intake and pre FDR session records may be more sensitive than the records of what occurs during FDR, and that disclosure of this information could put the client at a greater risk. This assessment arises from observations that victims attending a joint FDR session have already determined what they are comfortable to disclose in front of the perpetrator.

If FDR clients do not disclose their safety concerns, or raise them later in the process once assured of confidentiality, this can result in the need for a reassessment of how to proceed with the case, or may result in it being deemed not appropriate for FDR, a decision best made at the beginning.⁴⁴ It can also create an unnecessary strain on time and resources, as well as potentially exposing parties to FDR when it is unsafe. It may also mean that children remain in harmful environments for longer periods and could delay referral to support and therapeutic services.

In WLS NSW experience later disclosures of family violence or safety concerns may also result in victims being perceived as putting up barriers to the progress of the matter or being difficult, particularly if the FDRP is not trained or experienced in providing family violence informed services.

⁴⁰ See Mathew (2011) 214.

⁴¹ Mathew (2011) 214.

⁴² Mathew (2011) 213.

⁴³ Mathew (2011) 215.

⁴⁴ Mathew (2011) 214.

Removing barriers to information sharing

There are also calls to deprioritise confidentiality in FDR and family counselling in the interest of increasing information sharing between professionals and across jurisdictions, particularly to assist with effective management of complex cases involving family violence and child abuse.⁴⁵

The FLA already provides for a range of circumstances when a FDRP or family counsellor may disclose a communication made during FDR or family counselling without consent, including to assist an Independent Children's Lawyer (ICL) to properly represent a child's interests.⁴⁶ However the distinction between confidentiality and inadmissibility is concerning in the context of family violence. For example, a FDRP can disclose information in circumstances where a party threatens to kill the other parent, but this information is not admissible pursuant to section 10J FLA.⁴⁷

Altobelli and Bryant assert that the FLA requirements for confidentiality and inadmissibility of FDR and family counselling create a barrier to effective information sharing in cases involving allegations of family violence that is contrary to the paramount consideration of the best interests of the child and impedes essential early decision making.⁴⁸ They also contest the almost universal consensus that confidentiality is both beneficial and important to the mediation process, arguing that this viewpoint has been accepted and perpetuated without any real debate or adequate empirical evidence, referring to the discussion by Reich on this topic.⁴⁹ Reich analyses privileges against disclosure in the United States and concludes that there is no compelling empirical argument that mediation requires confidentiality.⁵⁰

Altobelli and Bryant also refer to research with Australian family consultants as evidence that losing confidentiality will not impact disclosures in FDR and family counselling. Family consultants provide statutory functions under the FLA, including assessment, report writing, and guidance on referral pathways.⁵¹ Under the 2006 reforms to the FLA communications with

⁴⁵ See, for example, Altobelli, T. and Bryant, D., 'Has Confidentiality in Family Dispute Resolution Reached Its Use-by-Date?' in Alan Hayes and Daryl Higgins (eds), *Families, Police and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 195.

⁴⁶ *Family Law Act 1975* (Cth) ss 10D(4) and 10H(4).

⁴⁷ Only admissions and disclosures relating to child abuse are admissible unless there is sufficient evidence from other sources available to the court *Family Law Act 1975* (Cth) s 10J(2).

⁴⁸ Altobelli and Bryant (2014) 196, particularly in the context of the increasing emphasis on safety in the FLA brought about by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) in 2012.

⁴⁹ Altobelli and Bryant (2014) 196-7 referring to Reich, J. B., 'A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure' (2001) 2001(2) *Journal of Dispute Resolution*.

⁵⁰ Reich cites research by Shuman and Weiner in 1987 which considered the Strong Form Hypothesis which is that '...the creation of a psychotherapist privilege will increase the number of patients visiting psychotherapists, encourage patients to begin therapy earlier, and...reduce the tendency of patients to with-hold information during psychotherapy. The other research referred to by Reich related to the importance of attorney-client privilege conducted in 1962 and 1989: Reich (2001) 214-217, 251.

⁵¹ *Family Law Act 1975* (Cth) ss 11A and 11B.

family consultants became admissible in proceedings⁵² and the Family Consultants Confidentiality Survey 2012 sought feedback on the impact of admissibility.⁵³ Of the respondents to the survey, 94 per cent saw benefits to the removal of confidentiality in their work, including the ability to provide information to the court early in the process, particularly in relation to risk factors.⁵⁴ Further, while 57 per cent of respondents prior to the change held concerns about the impact that loss of confidentiality would have on disclosure, two-thirds found this fear unwarranted.⁵⁵

However, the survey also reveals that 55 per cent of respondents identified drawbacks to the loss of confidentiality, including the potential lack of openness from parents; concerns around the negative repercussions for children and other family members; and a reduction in the ability to negotiate.⁵⁶ Of note, 77 per cent believed there would be drawbacks if communications in FDR were made admissible, including the loss of confidential space for families to resolve issues; the accompanying need to provide extensive training and education to FDRPs in relation to assessment, report-writing and cross-examination; and the potential for parents to withhold information.⁵⁷ Though, 57 per cent also believed there would be benefits to such a change, including the early provision of information to the courts, particularly in relation to risk factors; the avoidance of duplication, particularly in interviewing children; and improved collaboration across the family law sector.⁵⁸

There is otherwise very little research in this area, which is acknowledged by Altobelli and Bryant, and ideally future research will also consider the relevance of confidentiality for victims of family violence and sexual assault generally and in a family law context.

The courts have also considered the confidentiality of communications in FDR and family counselling. It has been held that where the consequences of deciding that communications are protected are so serious as to render evidence that may be highly relevant to the safety or best interests of the child inadmissible, then this protection should only be granted to communications that are 'clearly and affirmatively' covered by the FLA.⁵⁹ However, as has been outlined there is a lack of consensus about the scope of FDR and family counselling. Whilst ideally practitioners will clearly explain to clients that information obtained during the

⁵² *Family Law Act 1975* (Cth) s 11C, as amended by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

⁵³ The survey was sent to all 94 family consultants and 49 (52%) responded, with 21 (49%) (sic) of the respondents having worked as family consultants under the FLA prior to the 2006 reforms, Altobelli and Bryant (2014) 200.

⁵⁴ Altobelli and Bryant (2014) 201. An alternative mechanism for obtaining timely and accurate information about risk factors could be the employment of domestic violence specialists in family court registries as advocated for in the Women's Legal Services Australia, *Safety First in Family Law 2016* campaign <www.wlsa.org.au/media_releases/wlsa_launches_5_step_plan_to_keep_women_and_children_safe_in_family_law/> accessed 11 May 2016.

⁵⁵ 8 out of 12 family consultants who had held concerns did not find their concerns justified: Altobelli and Bryant (2014) 201.

⁵⁶ Altobelli and Bryant (2014) 201.

⁵⁷ Altobelli and Bryant (2014) 201.

⁵⁸ Altobelli and Bryant (2014) 201.

⁵⁹ *Smirnov v Turova* [2009] FMCAfam 1083; *Rastall v Ball & Ors* [2010] FMCAfam 1290, [33].

intake process may not be a protected communication, and explicitly state when family counselling, or FDR, begins, this may be insufficient to ensure safe, consistent and respectful collection and handling of confidential information.

It has also been held that in the absence of express words to the contrary, the scope of the protection for family counselling communications in section 10E FLA is limited to courts exercising jurisdiction under the FLA.⁶⁰ This decision arose in the context of a murder trial and Justice Douglas noted:

'There remains the argument that there is a public interest privilege in preventing family counsellors from giving evidence based on these provisions in the Act. If such a privilege exist, which was not established before me, then the balancing exercise required by *Sankey v Whitlam* falls clearly in favour of the public interest that a court in performing its functions in a criminal trial for murder should not be denied access to relevant evidence.'⁶¹

Information sharing and family violence

As noted above initiatives are being taken at both state and federal levels, which aim to facilitate greater information sharing between agencies about family violence. These reforms are partly in response to recommendations made in several reports and inquiries, including the Australian and NSW Law Reform Commissions' report on Family Violence.⁶² Similar recommendations have been made in the *Domestic Violence in Australia* federal report; the COAG Advisory Panel on Reducing Violence Against Women and Their Children Final Report and the Royal Commission into Family Violence in Victoria.⁶³

However some of the steps towards increased information sharing, particularly without consent, are contentious, and practitioners are faced with a dilemma about how to respect privacy laws and confidentiality, while also supporting collaborative, safety-focused case-management.⁶⁴

⁶⁰ *R v Baden-Clay* [2013] QSC 351.

⁶¹ *R v Baden-Clay* [2013] QSC 351 [23].

⁶² ALRC Report No 114, NSWLRC Report 128 (2010); NSW Auditor-General's Report Performance Audit, *Responding to Domestic and Family Violence* (2011); The Legislative Council's Standing Committee on Social Issues, *Inquiry into Domestic Violence Trends and Issues* (2012); National Council to Reduce Violence Against Women and Their Children, *Time for Action: the National Council's Plan for Australia to Reduce Violence Against Women and Their Children, 2009-2021* (Department of Families, Housing, Community Services and Indigenous Affairs, 2009); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Attorney General's Department, 2009).

⁶³ Senate Finance and Public Administration References Committee, Parliament of Australia, *Domestic Violence in Australia*, Interim report (March 2015) 1.68; COAG Advisory Panel on Reducing Violence against Women and their Children (2016) Recommendations 6.4 and 6.5; *Royal Commission into Family Violence in Victoria*, State of Victoria (2014-16) Recommendations 5, 6, 9, 134 and 136.

⁶⁴ Wilcox (2010) 10.

Greater information sharing about family violence

Proponents of information sharing assert that information must be shared between agencies, courts and police in order to improve responses because victims may not always provide all relevant information to all of the services they engage with, either because they are unaware of the requirements, are fearful, or are exhausted and/or traumatised by abuse and re-telling of experiences.⁶⁵ Increased information sharing is said to allow agencies to be more informed about levels of risk and to provide more appropriate case management, as well as improving the decision making ability of the court and minimising the secondary victimisation that can occur when victims have to retell their stories.⁶⁶ The perceived benefits from preserving confidentiality, such as security of location, privacy in proceedings to minimise the shame and discrimination that may be experienced by victims and the protection of children living with violence, are not seen to outweigh the benefits of enhanced information sharing and collaboration.⁶⁷

However greater information sharing is unlikely to improve responses to domestic and family violence where service provision is ad hoc or varies across localities, particularly when also faced with systemic problems such as delay and waitlists.⁶⁸ Also in a climate of significant funding variations for services responding to family violence, inadequate or misdirected resourcing is likely to be an ongoing issue. This may mean that information sharing could inadvertently cause a prioritising of response to those matters with multiple agencies involved at the expense of others involving more vulnerable clients who are struggling to connect with even one agency.

Consideration must also be given to distinguishing information sharing about the victim and information sharing about the perpetrator.

Information sharing without consent

As frontline services improve their understanding of the nature and extent of family violence they want to identify and protect victims earlier and more effectively. These are obviously important and supported objectives, but it is equally important not to lose sight of the increased risk and pressure victims may experience if someone else is imposing a solution on them.

Victims have a right to be heard and to have the base of their fear acknowledged and taken into account. Those coming into contact with victims also need to be respectful of their agency and avoid replicating an experience for victims that makes them feel that they do not have

⁶⁵ Wilcox (2010) 8.

⁶⁶ Wilcox (2010); ALRC Report No 114, NSWLRC Report 128 (2010); Chisholm, R., 'Family Courts Violence Review: A Report by Professor Richard Chisholm' (Report, Attorney-General's Department, 2009).

⁶⁷ Wilcox (2010); NSW Department of Justice (2014) 'Individuals have rights to both safety and privacy, but where these rights are in tension, victims safety comes first.' 19.

⁶⁸ Wilcox (2010).

choice about the actions being taken in their lives.⁶⁹ Victims will generally know when it is safe for them to disclose information and to seek assistance, though it is acknowledged there will be instances when victims may be impacted by impaired capacity, including from trauma, or be safer if an authority figure is responsible for a decision.

Victims may also be dissuaded from reporting to police or contacting other services out of fear that their confidential information may be shared and ultimately obtained by the perpetrator.

Family violence is complex and there can be many reasons why victims remain in a violent relationship, including their experiences of powerlessness and isolation in controlling relationships, coexisting feelings of fear and love about the perpetrator, anxiety that there may be a statutory removal of their children because of the presence of violence⁷⁰, concerns about an escalation in violence and intimidation towards them and their children if they attempt to leave the relationship or a belief that it may be safer to stay and protect children rather than leaving them exposed to unsupervised time with the perpetrator.⁷¹ If the recipients of information do not have a detailed understanding of the nature and dynamics of family violence there is a risk that information sharing without consent may result in inferences being drawn that victims who have not yet left a relationship are not helping themselves or that the violence is not serious.⁷²

In addition, WLS NSW is concerned about the impact of incorrect or incomplete information sharing. This may be particularly dangerous if a victim of violence who is a primary victim has been incorrectly identified as the primary aggressor.⁷³ Under the new Part 13A *Crimes (Domestic and Personal Violence) Act 2007* and the *Domestic Violence Information Sharing*

⁶⁹ In *Douglas & Mauldon* [2015] FCCA 2217 Judge Harman stated that there was both a common law and statutory obligation on the victim mother to make a full and frank disclosure of all relevant evidence of the violence, including '...the very evidence which she has disclosed to a counsellor, albeit "in confidence" (emphasis in original)'. While strict adherence to such legal principles is clearly a temptation in the pursuit of expedient and safer outcomes it is equally important to actively consider the impact that such an approach may have on victims. It is noted that Judge Harman considered the repercussions of disclosure, which is discussed further below.

⁷⁰ This is particularly the case for Aboriginal and Torres Strait Islander women: Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experiences of the Courts* (2016) 18; COAG Advisory Panel on Reducing Violence against Women and their Children (2016) 40.

⁷¹ Other reasons include fear that they won't be believed, shame, fear of retribution or lack of culturally appropriate services: Morgan, A. & Chadwick, H., *Key Issues in Domestic Violence*, Australian Institute of Criminology Research in Practice Summary Paper No. 07, Dec 2009 8; Also self blame, wanting to help their abusive partner and lack of money and resources: Alexander, R., 'Women and Domestic Violence' in Easteal, P., *Women and the Law in Australia* (LexisNexis Butterworths 2010) 156; Uncertainty about the impact on immigration status: Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experiences of the Courts* (2016) 18; Evidence also indicates that the post separation period can be one of the most dangerous times for victims: Roberts, Chamberlains and Delfabbro (2014) 2.

⁷² Women escape violence in differing ways, which can involve many attempts to leave before the final separation: COAG Advisory Panel on Reducing Violence against Women and their Children (2016) 41.

⁷³ Women's Legal Services NSW, *Women Defendants to AVOs: What is Their Experience of the Justice System?* (Women's Legal Services NSW, March 2014) <www.wlsnsw.org.au/wp-content/uploads/womendefAVOsreport.pdf>.

Protocol, a perpetrator does not have an automatic right to request amendment of their personal or health information that has been obtained under Part 13A.⁷⁴

This could result in inaccurate and untested information being admitted as evidence into other jurisdictions, such as family law, which may then place children in greater danger if they are ordered to spend time with the actual primary aggressor.

Confidentiality and subpoenas

It is common practice in disputes about parenting arrangements for subpoenas to be issued to a range of services and professionals, including counsellors and medical practitioners as well as police, child welfare services, health services and schools. It is noted that some ICLs and family law practitioners are experienced in litigation involving allegations of family violence and child abuse and do not subpoena counselling records as a matter of course. However in many cases a wide range of subpoenas are issued at the same time and little consideration may be given to whether they are all required or if the information can be obtained from only one or two sources. For example, if the fact in issue is whether there has been family violence, police records may be sufficient without the need to also pursue therapeutic notes.

This blanket approach to obtaining a full range of records raises concerns that subpoenas are being used for other than a legitimate forensic purpose, as fishing expeditions or where the intended use does not outweigh the gravity of the damage done by violating the confidentiality of therapeutic relationships.⁷⁵ It is recognised that there may be a genuine need for the courts to access sensitive records in some cases, but the potential for harm requires such a need to be established in each case.

In the majority of cases the courts appear to easily find that subpoenaed material, including sensitive records, meets the threshold of apparent relevance⁷⁶. In part this occurs because the process of objecting to a subpoena can be very onerous and daunting for the service provider or the subject of the notes.⁷⁷ Even in the limited cases where objections are raised, orders are generally made to produce the material with restrictions such as a right of first inspection to

⁷⁴ NSW Department of Justice (2014) 72-73.

⁷⁵ Levy, Galambos and Skarbek (2014).

⁷⁶ *Hatton v The Attorney-General (Cth)* (2000) FLC 93-038 '...the present state of authority is such that lack of apparent relevance will be a sufficient ground in itself to set aside a subpoena' 49; *Sadek and Ors & Hall and Anor* [2015] FamCAFC 23 where the Full Court acknowledges that 'one person's view of the relevance of parts of the documents, including a judge's, may not be the same as others' 35; *Dupont & Chief Commissioner of Police and Anor* [2015] FamCAFC 64 40.

⁷⁷ This is a common observation made to WLS NSW lawyers by counselling services, NGOs and private therapists who have had their records subpoenaed. For example, one worker has noted that they simply lack the resources, including time and courage, to object and they have come to believe that resistance is futile. Additionally objections must be raised within the relatively short timeframe of ten days. See also Cossins, A., 'Contempt or Confidentiality?: Counselling Records, Relevance and Sexual Assault Trials' (1996) 21(5) *Alternative Law Journal* 223; Levy, Galambos and Skarbek (2014).

one party and redaction or inspection by legal representatives only and not parties.⁷⁸ On much rarer occasions an order may be made for the material to be viewed by the judge only who will determine relevance and weight at a later stage in the proceedings.⁷⁹

It is also questionable how much protection or comfort an order for inspection by only the legal representative offers when it is common practice for lawyers to make oral recordings of the contents of records, which are then typed up and can be provided to their clients.

Specific legislative restrictions are encouraged. For example, court rules allow for the copying of subpoenaed documents '*other than a child welfare record, criminal record, medical record or police record*'.⁸⁰ Parties and legal representatives are generally informed of this rule when they attend court for document inspection. Whilst this rule is usually respected it can be circumvented as illustrated below:

During an attendance at court for subpoena inspection a WLS NSW lawyer observed a party taking photos of police and child welfare records with their phone. The more concerning aspect is that none of the legal representatives sitting in immediate proximity, including one who regularly acts as an ICL, did anything to stop this. When the WLS NSW lawyer brought the party's actions to the attention of the court staff, they responded quickly and appropriately and asked the party to delete the photos.

This experience demonstrates the ways that technology can be used to undermine legislative protections and the need for all legal representatives to be diligent in their duty to the court.

There is also concern that subpoenas are used in family law proceedings to cause harm, for example to subpoena another party's psychiatric or counselling records and to then use them to disadvantage, intimidate, humiliate and stigmatise that party.⁸¹ This raises serious concerns around the use of litigation as a means to perpetuate control, abuse, and to re-victimise parties that have experienced family violence and sexual assault. There is growing recognition that the abuse of court processes, including scrutiny of personal records, is often

⁷⁸ For example in *Douglas & Mauldon* [2015] FCCA 2217 both the mother as the subject of the material and the Benevolent Society as the service provider objected to the production of records because of concerns about potential repercussions in the context of family violence. Judge Harman ordered that the Benevolent Society redact the material before production and that the mother have a right of first inspection for 14 days to redact any further information that may have the potential to disclose her location. Additionally the father could only inspect the material by first filing and serving a Notice of Address for Service and then be supervised by Court staff at all times during the inspection.

⁷⁹ The subject of medical records can also request a right of first inspection of medical records in order to determine the need for an objection: Rule 15.31 *Family Law Rules 2004* and Rule 15A.14(2) *Federal Circuit Court Rules 2001*.

⁸⁰ Rule 15.30(2)(b) *Family Law Rules 2004* and Rule 15A.13(2)(b) *Federal Circuit Court Rules 2001* (FCCR). In the FCCR a medical record is defined as 'for a person, means the histories, reports, diagnoses, prognoses, interpretations and other data or records, written or electronic, relating to the person's medical condition, that are maintained by a physician, hospital or other provider of services or facilities for medical treatment'.

⁸¹ Levy, Galambos and Skarbek (2014).

an intentional controlling act and may be a 'legalized secondary assault on women and children'.⁸²

The courts must be assiduous and proactive in preventing subpoenas from being issued without a specific gap in the evidence. In many cases it may also be fair to find that the perpetrator will not be disadvantaged by not having access to therapeutic records where they are already aware of the likely content of those records.⁸³

Judicial discretion

Generally the decision about the inclusion of sensitive material into evidence and the weight to be given to it is one for judicial discretion. In the family law jurisdiction this can be an even more significant judicial role given the wide discretion that can be exercised, particularly in matters relating to children where the rules of evidence do not apply unless the court decides they are required in the individual case.⁸⁴

Cossins, who wrote extensively on the use of sexual assault communications in criminal trials, argues that the general judicial discretion is inadequate in terms of providing a safeguard against the problems that are caused by breaching confidentiality of sensitive material. These include the impact on the personal safety and recovery of victims; re-victimisation by the court systems; the introduction of potentially unreliable and inaccurate hearsay evidence of counsellors; and the use of confidential communications in a setting which lacks understanding of the therapeutic process.⁸⁵

It has also been asserted that '[a] judicial discretion is only as good as the person exercising it,' and there is a tendency for the judiciary to lean in favour of admitting as much potentially relevant material as possible.⁸⁶

The nature of the discretion also means that judicial officers undertake a new assessment for each individual case, and the variation in their approaches can give rise to an inconsistency in results.⁸⁷ Additionally judicial officers are not required to have minimum education or experience standards before deciding matters involving family violence. Reliance on family consultants, ICLs, experts and other practitioners may be insufficient as well, as they also have no minimum standards of accreditation or experience in assessing or understanding family violence.⁸⁸

⁸² Radford, L. and Hester, M., *Mothering Through Domestic Violence* (Jessica Kingsley Publishers Ltd, 2006) 100; YWCA Vancouver *Court-Related Abuse and Harassment: Leaving an Abuser can be Harder than Staying* (2010).

⁸³ *Trapp & Vonne* [2009] FMCAfam 497 25.

⁸⁴ *Family Law Act 1975* (Cth) s 69ZT.

⁸⁵ Cossins (1996) 225–6.

⁸⁶ Cossins (1996) 224, discussing the use of sexual assault counselling records as evidence.

⁸⁷ Cossins (1996) 225.

⁸⁸ A substantial minority of court users (2012: 33% and 2014: 31%) report that they were not asked about family violence or safety concerns: Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J., Moore, S., Moloney, L., Coulson, M. and Tayton, S., *Evaluation of the 2012 Family Violence Amendments, Synthesis Report* (Australian

Victims have reported dismay and distress at the lack of understanding of domestic violence demonstrated by the professionals working with them.⁸⁹ Analysis has also highlighted that the potential for effective intervention in cases involving family violence is reduced when the professionals have limited expertise in family violence.⁹⁰

The need for adequate training and a family violence informed approach was also identified in the AIFS Independent Children's Lawyer Study where some respondents:

'...were critical of ICLs encouraging a "pro-contact" approach, irrespective of whether such arrangements were in the best interests of the child/young person', with one judicial officer noting: 'Like many of us in the family law field, there has been an over focus [on] the need to preserve child/parent relationships, sometimes at the risk of minimising other issues of concern. To be fair to our local ICLs, this has been a failing with some report writers, which is then carried on by the ICL.'⁹¹

It is very important that judicial officers, lawyers and report writers ensure that court processes are not co-opted by perpetrators to 'perpetuate a pattern of dominance and control'.⁹² This requires a sophisticated understanding of the tactics perpetrators will utilise just to cause stress for a victim, including using the court system improperly through multiple applications or seeking unnecessary adjournments; manufacturing evidence or crisis; using a history of mental illness or substance use against the victim, even if these behaviours have been triggered or exacerbated by the violence; making false allegations of abuse of children by the victim, and obfuscating the violence by injuring themselves and calling police.⁹³

Institute of Family Studies, October 2015) 33. The publication of the *Australian Standards of Practice for Family Assessments and Reporting* by the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia in 2014, which provides guidance on the expected levels of knowledge and understanding of family violence for family assessors is noted.

⁸⁹ Laing, L., *No way to live: Women's experiences of negotiating the family law system in the context of domestic violence* (University of Sydney 2010) 58-62.

⁹⁰ Hooker, L., Kaspiew, R. and Taft, A., *Domestic and Family Violence and Parenting: Mixed Methods Insights into Impact and Support Needs: State of Knowledge Paper* (Landscapes series 01/2016) 28.

⁹¹ Australian Institute of Family Studies *Independent Children's Lawyer Study: Final Report* (2014) 114. An evaluation of the amendments to the FLA following the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) has reported that since the implementation of the reforms in 2012 Family Reports were more likely to be generated in cases involving allegations of family violence and/or child abuse (53% compared to 33%) and explicit discussion of risk assessment was more evident in Family Reports (31% compared to 22%): Kaspiew, R., Carson R., Qu, L., Horsfall, B., Tayton, S., Moore, S., Coulson, M. and Dunstan, J., *Court Outcomes Project* (Evaluation of the 2012 Family Violence Amendments), (Australian Institute of Family Studies, 2015) 65.

⁹² Chewter, C., 'Violence Against Women and Children: Some Legal Issues' (2003) *Canadian Journal of Family Law* 99 142; Roberts, Chamberlain and Delfabbro (2014) who note that all 15 victims in their study reported that engagement with family law proceedings added to the trauma they had already experienced in their relationships 3, 5; COAG Advisory Panel on Reducing Violence against Women and their Children (2016) which notes '...a lack of knowledge of the complex dynamics of domestic violence by judicial officers, lawyers and court staff can allow perpetrators to use the justice system as another tool for abuse, with harmful results for women and their children' 27.

⁹³ YWCA Vancouver (2010) 5-6; Roberts, Chamberlain and Delfabbro (2014) 7, 12; Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experiences of the Courts* (2016) 47; Bancroft, L., Silverman, J.G. and Ritchie, D., *The Batterer as Parent* (2012); The Judicial Council on Cultural Diversity also notes: 'Many

Lesley Laing has proposed comprehensive ongoing training for family law professionals in understanding and responding to domestic violence, including a focus on:

'...the interconnectedness of the abuse of women and children; conducting risk assessments and developing safety plans; the effects of trauma on women and children; the conditions that promote recovery from trauma; the dynamics of sexual and domestic violence perpetration; the risks and forms that post-separation violence can take; and the assessment of claims of change in the perpetrators of abuse.'⁹⁴

The Royal Commission into Family Violence in Victoria has also recommended that the 'Victorian Government provide funding to continue the development of comprehensive family violence learning and development training covering family violence, family law and child protection for court staff and judicial officers'.⁹⁵

Additionally the Final Report of the COAG Advisory Panel on Reducing Violence Against Women and their Children recommends the education of mainstream professionals about the dynamics of gender, power and violence against women, with requirements for regular training updates for those professionals who have frequent contact with victims, perpetrators and their children.⁹⁶ The Report notes the specific protective benefits that can arise from enhanced judicial education about violence against women, with further advantages in extending the training to non-judicial court staff as well.⁹⁷

stakeholders reported instances of men abusing court processes in order to maintain power and control over women. Lawyers commented on the complexity that judicial officers face and the degree of expertise required to manage some domestic violence cases. Many stakeholders noted that tone and subtle interjections by a judicial officer had a powerful impact on changing the dynamics of the room': Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experiences of the Courts* (2016) 32.

⁹⁴ Laing (2010) 95.

⁹⁵ State of Victoria (2014-16), Recommendation 216. Other recommendations include assessing the knowledge, experience, skills and aptitude for hearing cases involving family violence, including the knowledge of relevant aspects of federal family law, of potential appointees to the Victorian magistracy (Recommendation 214) and including material on the dynamics and complexities of family violence in general programs offered to judicial officers and Victorian Civil and Administrative Tribunal members (Recommendation 215).

⁹⁶ COAG Advisory Panel on Reducing Violence against Women and their Children (2016) 37-38; There are also recommendations for judicial officers and court staff to receive training about how to work with interpreters, including sensitivity to the need for gender specific interpreters, particularly for matters involving family violence: Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experiences of the Courts* (2016) 28-36.

⁹⁷ COAG Advisory Panel on Reducing Violence against Women and their Children (2016) 38. See also Wakefield, S. and Taylor, A., *Judicial Education for Domestic and Family Violence: State of Knowledge Paper* (ANROWS Landscapes series 02/2015) who conclude that there is a clear need for judicial education specific to domestic violence to support victims and minimise re-victimisation through ensuring positive experiences and outcomes in the courtroom 31; A welcome initiative is The National Family Violence Bench Book, which is due in June 2017, and which aims to be a comprehensive online resource to assist with best practice and consistency: <www.attorneygeneral.gov.au/MediaReleases/Pages/2015/SecondQuarter/9-June-2015-National-Family-Violence-Bench-Book.aspx> accessed 22 Mar 2016.

Counselling notes as evidence

Record keeping is a vital aspect of a therapeutic relationship, both as a clinical and a supervisory tool. It is acknowledged that there may be instances when counselling records are required to prove a fact in issue during litigation and may have significant probative value, but access to such sensitive information should only happen in clearly defined circumstances. As discussed above there has been significant law reform in relation to access to counselling records in sexual assault criminal and related civil law matters, which has significantly reduced the misuse of such records by defence lawyers.⁹⁸ It is also important to remember the purpose for which the records were created.

It is well recognised in the literature that notes taken by counsellors, psychologists and psychiatrists are not intended to be read by third parties, and may be highly vulnerable to misinterpretation.⁹⁹ Such notes are not written with an investigative function; it is not the role of the counsellor to uncover facts or verify the truth or accuracy of what their patient is telling them.¹⁰⁰ Nor does the patient have the chance to read over these notes and sign as to the truth of the information contained therein.¹⁰¹ These notes also include information on a patient's emotional state, which is highly subjective,¹⁰² and should not be treated in the same way as other evidence, such as police statements.¹⁰³ Indeed, such evidence amounts to hearsay and carries the very real risk of being an inaccurate account of what the patient said or felt at the time.¹⁰⁴

As Angela Jones, counsellor from the Canberra Rape Crisis Centre writes:

The confidential communications contain the perceptions of the counsellor (accurate or not) which will vary in detail and precision as to history, personal information and emotional state. In the counselling context, such information has enormous value, but in the adversarial setting, such evidence, due to its inherent uncertainty, will outweigh its probative value. Accessing confidential communications could in fact jeopardise the fair trial principle.¹⁰⁵

⁹⁸ See also Lambert, R., 'Access to Counselling: Testing the Sexual Assault Communications Privilege' (2013) *Law Society Journal* 76; Jillard, A., Loughman J. and MacDonald, E., 'From Pilot Project to Systemic Reform: Keeping Sexual Assault Victim's Counselling Records Confidential' (2012) 37(4) *Alternative Law Journal* 254.

⁹⁹ See, for example, Levy, Galambos and Skarbek (2014); Cossins (1996); Jones (1996); Cossins A. and Pilkinton, R., 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) 19(2) *UNSW Law Journal* 222; Cossins, A., 'Tipping the Scales in Her Favour: The Need to Protect Counselling Records in Sexual Assault Trials' in Patricia Easteal, *Balancing the Scales: Rape, Law Reform and Australian Culture* (The Federation Press, 1998) 94; Easteal, P., 'If Only I Didn't...Maybe I Wasn't...' (1996) 21(5) *Alternative Law Journal* 225.

¹⁰⁰ Gleeson, C., 'Striking a Balance: The Proper Operation of the Sexual Assault Communications Privilege' (2013) *Bar News: The Journal of the NSW Bar Association* 60 71; Cossins and Pilkinton (1996) 227-8; Jones (1996) 32.

¹⁰¹ Gleeson (2013) 71; Cossins and Pilkinton (1996) 227; Cossins (1996) 227; Cossins (1998) 96.

¹⁰² Cossins and Pilkinton (1996) 227.

¹⁰³ Cossins and Pilkinton (1996) 227; Cossins (1996) 227; Cossins (1998) 96; Jones (1996) 32.

¹⁰⁴ *R v Osolin* (1994) 109 DLR (4th) 478 discussed in Cossins and Pilkinton (1996); L Gardiner and M Roberson (1995) *Fishing Expeditions: Questioning the Legal Ethical Issues for Sexual Assault Counsellors*, paper presented at the First National Conference on Sexual Assault and the Law, 28-30 November, 8 in Cossins (1998) 96.

¹⁰⁵ Jones (1996) 32.

Another counsellor has commented:

I do not understand why counselling files, which usually contain information about a client's feelings are relevant...It is not my role to investigate [the facts in issue]. I am concerned with a client's emotional and social well-being. Investigation is properly handled by the Police.¹⁰⁶

Gardiner and Roberson observe in relation to a counsellor's notes:

A file may hold the perceptions of the person that [sic] writes in the file which may or may not be an accurate account of what the client/patient has communicated. As such, the file can hold and perpetuate misinformation...[such as] [a]n incorrect history, or personal information which has been subjectively interpreted without clarifying its personal meaning to the client/patient.¹⁰⁷

The literature also raises serious concerns about the potential for the counselling notes of sexual assault survivors to be misunderstood and misused in court proceedings.¹⁰⁸ This arises from the common compulsion of sexual assault survivors to explore feelings of guilt, responsibility and self-blame, which are caused by dominant societal misconceptions around sexual assault and are a fundamental part of dealing with the impact of trauma.¹⁰⁹ Those who experience sexual assault are surrounded by the common myths and misconceptions about rape, which are pervasive in society.¹¹⁰

These myths and subsequent feelings of self doubt and self blame mean that sexual assault victims frequently make comments to their counsellors such as: 'Since it was my husband (boyfriend, date, neighbour...) it wasn't really rape', 'Maybe I shouldn't have gone there with him', 'Perhaps I should have worn a different dress', or 'Why didn't I struggle more?'¹¹¹ The ability for the survivor to explore these feelings with the counsellor is fundamental to their recovery.¹¹² However, the lack of protection of these notes means that a single statement can be drawn out in evidence and taken out of context.¹¹³ Where these notes are shared outside of a therapeutic environment, the potential for misunderstanding is serious,¹¹⁴ and this is enhanced by the internalised myths that the judge may also possess and which may impact

¹⁰⁶ Cossins and Pilkinton (1996) 228.

¹⁰⁷ L Gardiner and M Roberson (1995) *Fishing Expeditions: Questioning the Legal Ethical Issues for Sexual Assault Counsellors*, paper presented at the First National Conference on Sexual Assault and the Law, 28-30 November, 3, in Cossins and Pilkinton (1996) 238.

¹⁰⁸ Jones (1996); Easteal (1996); Cossins (1996); Cossins (1998); Cossins and Pilkinton (1996).

¹⁰⁹ Easteal (1996); Jones (1996); Cossins (1998) 96.

¹¹⁰ Easteal (1996); Cossins and Pilkinton (1996); Comments by Chrissie Hynde illustrate this effectively: 'If I'm walking around in my underwear and I'm drunk...Who else's fault can it be?' <www.smh.com.au/lifestyle/celebrity/chrissie-hynde-causes-outrage-over-rape-remarks-20150830-gjb8o7> accessed 2 Sep 2015.

¹¹¹ Eastel (1996) 225.

¹¹² Jones (1996); Easteal (1996); Cossins (1996).

¹¹³ Jones (1996) 31.

¹¹⁴ Cossins (1996).

upon the exercise of their judicial discretion.¹¹⁵ WLS NSW is of the opinion that this potential for misinterpretation is equally a risk for records relating to the experiences of victims of family violence.

Additionally if '[c]ounselling communications are inherently problematic as regards reliability and may adversely affect the administration of justice',¹¹⁶ and they are to be admitted into evidence, they should first undergo a detailed analysis of the methods used to gather and evaluate the information recorded in them.¹¹⁷

WLS NSW is also aware that counsellors and psychologists alter their note taking practices, including excluding information, in order to mitigate the risk that their notes may be read and used by a third, and sometimes hostile, party.¹¹⁸ This practice limits their ability and the ability of future healthcare providers to be informed about each stage of the patient's healing process, and therefore limits the opportunity to provide comprehensive treatment.¹¹⁹ WLS NSW is also concerned that if counsellors omit relevant disclosures by victims of family violence this may have the unintended consequence of allowing an inference to be drawn during litigation that the violence did not occur or that the victim has overstated it in their other evidence.

Impact on the therapeutic relationship

The admission of counselling records into evidence can also undermine the therapeutic relationship. Without the guarantee of confidentiality, people may decide not to seek therapeutic care or they may limit their disclosures or discontinue treatment abruptly. Further, a breach of confidentiality may cause additional psychological damage, setting them back in their recovery process or stopping it altogether.

The therapeutic relationship that exists between a client and a counsellor, psychologist or psychiatrist is built on a powerful link between trust, confidentiality and the recovery process that is fundamental to its' success.¹²⁰ The importance of confidentiality in the context of this relationship is widely recognised in the literature and by clients, as well as counsellors, psychologists and psychiatrists whose work is being affected by the use of subpoenas.¹²¹ Given the inherent power imbalance that exists in these relationships with the client in a position of vulnerability, the ability of the therapist to assure the client of the confidential nature of the relationship is crucial to the development of trust.¹²² Without this assurance,

¹¹⁵ Cossins and Pilkinton (1996).

¹¹⁶ Jones (1996) 32.

¹¹⁷ See, e.g., MacCrimmon, M., 'Trial by Ordeal' (1996) 1 *Canadian Criminal Law Review* 31.

¹¹⁸ See also Cossins and Pilkinton (1996) 228; Cossins (1998).

¹¹⁹ Cossins (1998) 87; Cossins and Pilkinton (1996) 231.

¹²⁰ Cossins (1998) 97.

¹²¹ Cossins and Pilkinton (1996); Cossins (1996); Cossins (1998); Jones (1996); Levy, Galambos and Skarbek (2014); McDonald, E., 'Resisting Defence Access to Counselling Records in Cases of Sexual Offending: Does the Law Effectively Protect Clinician and Client Rights' (2013) 5(2) *Sexual Abuse in Australia and New Zealand* 12.

¹²² Cossins and Pilkinton (1996) 229.

clients are less likely to engage in the process, or may censor their disclosures.¹²³ Additionally victims of family violence may have been repeatedly told that their opinions are worthless and that no one will believe them so to trust someone enough to make a disclosure can be a very big step.

One counsellor reported:

When I have told my clients that the counselling notes of our session may be subpoenaed I have had direct experience of clients leaving counselling and in another case a client deliberately censors herself...¹²⁴

Understandably, practitioners therefore view breaches of confidentiality through use of subpoenas as undermining the primary purpose of counselling and psychiatric care, being effective treatment.¹²⁵ It means vulnerable victims elect to compromise essential therapeutic interventions to avoid potential exposure and shame through court processes. As a result, some people in need of psychiatric care do not feel confident enough to access it, and others are at a greater risk of misdiagnosis and treatment plans that subsequently do not meet their actual needs.¹²⁶ With victims often suffering from post-traumatic stress disorder (PTSD), suicidal tendencies, depression, chronic anxiety and other serious mental illnesses,¹²⁷ there is a clear public interest in ensuring that they are supported in accessing treatment.

Deterrence from fully accessing support services undermines the ability of people to recover from trauma and mental illness, and in parenting matters, is likely to have an impact on parenting capacity. Further, misdiagnoses can have additional negative effects in family court matters. For example, a woman who has been the victim of family violence and is suffering from PTSD may not make full disclosures about her experiences of violence due to fear that her privacy will be breached and her safety compromised. She may then be misdiagnosed and mischaracterised as having another mental illness, with the incorrect diagnosis then used to assess her parenting capacity. Similarly substance abuse by victims of violence may be given undue weight in proceedings if the context of family violence is not disclosed to health service providers during treatment.

The family courts must actively examine this issue and identify strategies to ensure that any risks to therapeutic relationships are minimised and particularly that victims of family violence do not experience additional violations of trust and security. This includes establishing systems to ensure that evidence relevant to facts in issue is first sought from the least intrusive source. It is acknowledged that it may not be possible to determine if there is

¹²³ Bronitt, S. & McSherry, B., 'The use and abuse of counselling records in sexual assault trials: Reconstructing the "Rape Shield"?' (1997) *Criminal Law Forum* 259-291 266; Levy, Galambos and Skarbek (2014) 333; Cossins (1998).

¹²⁴ Cossins and Pilkinton (1996) 230.

¹²⁵ Levy, Galambos and Skarbek (2014) 333; Cossins and Pilkinton (1996).

¹²⁶ U.S. case law has affirmed the importance of the psychotherapist-patient privilege and stated that 'Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life...' and an assurance of utmost confidence is required for the full disclosure upon which diagnosis and treatment depends: Simon and Willick (2016) 54.

¹²⁷ Cossins (1998) 97-8.

sufficient other evidence until the voir dire at trial.¹²⁸ In those instances therapeutic records produced on subpoena would ideally be kept sealed until other material has been exhausted.¹²⁹

Secondary victimisation

The literature widely recognises the serious risks that can arise in relation to disclosure of communications made by sexual assault victims.¹³⁰ While much of the commentary focuses on the context of the criminal trial, it is likely that these risks are mirrored in the family law system, particularly given the frequency of sexual assaults that occur in intimate partner relationships.¹³¹

By breaching the confidentiality of these communications, victims re-experience their initial feelings of shame and doubt and are made to relive the feeling of violation associated with the original assault.¹³² In the victim's journey to recovery, it is important that they are able to regain a sense of control over their own lives and an ability to set their own boundaries. When their counselling notes are accessed, this undermines the victim's sense of control over their own confidential information, and takes away their decision making power. It is this experience, which causes them to again experience a sense of powerlessness and invasion, re-victimising them and undermining their journey to recovery.¹³³

In regards to having their counselling files subpoenaed, one victim stated:

I felt sick when this happened because he [the perpetrator] was allowed to have access to my thoughts and fears...all the things I had discussed with my counsellor. I felt like I was being punished for speaking out....I could just imagine him going through my personal records. It was like having him invade my life again.¹³⁴

Additionally in the context of criminal injuries compensation it is not uncommon for victims to elect not to make an application for a government payment that recognises the violence they have experienced because of fear that the perpetrator may find out about the application and access their counselling records or personal information.

¹²⁸ *Relationships Australia (Qld) & M* (2006) FLC 93-305 32; *Trapp & Vonne* [2009] FMCAfam 497 20.

¹²⁹ For example see *Ireland & Dwyer* [2014] FCCA 313 where Judge Harland refused to grant leave to inspect the counselling records of children stating: 'In my view there is likely to be sufficient evidence of the admission or disclosure available to the court from other sources' 35 and concluded: '...but I am also not going to set aside the subpoena either as it may be that the issues needs to be revisited later in the proceedings depending on the outcome of the family report and the section 69ZW order' 45.

¹³⁰ Cossins (1996); Cossins and Pilkinton (1996); Cossins (1998); Jones (1996); McDonald (2013).

¹³¹ As identified by family violence services in ALRC Report No 114, NSWLRC Report 128 (2010) 24.40. The risks are likely to be even greater given that there is under-reporting of sexual assault in general and that partner rape has particularly low reporting, prosecution and convictions ALRC Report No 114, NSWLRC Report 128 (2010) 24.14-16 citing Professor Patricia Eastal.

¹³² Roberts, Chamberlain and Delfabbro (2014) 11; Cossins (1996); Jones (1996).

¹³³ Jones (1996) 30-1; Cossins and Pilkinton (1996) 225.

¹³⁴ Cossins and Pilkinton (1996) 225.

Further, it is not only the perpetrator who the victim feels is able to invade personal thoughts, but the court system more broadly which contributes to the experience of secondary victimisation, including via direct cross examination of victims by self represented perpetrators or self represented victims having to directly cross examine a perpetrator, false allegations and litigation abuse.¹³⁵ Depending on the attitude that is taken towards the information revealed in the notes by the judge, there is also a risk that negative stereotypes that the victim has worked through in counselling will be reintroduced and reinforced, thus allowing the courtroom to further re-victimise and perpetuate society's tendency to victim-blame.¹³⁶

Direct evidence from victims must also be acknowledged and given appropriate weight, recognising that contact with the family law system may be the first opportunity some victims have had to disclose their experiences. As previously outlined there are very complex reasons, including fear, shame, love and duty, which contribute to victims of family violence, including children, keeping the violence a secret.¹³⁷

Safety concerns

Victims may also be dissuaded from engaging in a therapeutic process if they fear that their counselling records will be accessed via litigation and then enable the perpetrator to locate them.¹³⁸ Even if details such as the victim's address is blanked out, there can still be enough information in the notes for the perpetrator to figure out the names of their support network, what services they are attending, and other information that can be used to locate them.¹³⁹

One victim of sexual assault explains her experience of having her notes subpoenaed:

If he [the perpetrator] has access to my counselling files or whatever he could work out where I live. He would certainly know which counsellor I had been to and where she was. I am scared he will come after me...¹⁴⁰

Another stated:

After he [the perpetrator] had my files I was so scared that he would try to find me. I had a silent phone number and he didn't know where I lived. It became very scary going to counselling because he would have known which sexual assault service I was going to. I started to lock up the house at night and couldn't sleep. It was like waiting

¹³⁵ Loughman, J., 'Protecting Vulnerable Witnesses in Family Law' (2016) Feb Issue 19 *The Law Society of NSW Journal* 26-27; Women's Legal Services Australia, *Vulnerable Witness Protection in Family Law* campaign <www.wlsa.org.au/campaigns/vulnerable_witness_protection_in_family_law> accessed 11 May 2016; Cossins and Pilkinton (1996) 226; Radford and Hester (2006) 113.

¹³⁶ Easteal (1996); Cossins (1996).

¹³⁷ Radford and Hester (2006) 105.

¹³⁸ Cossins and Pilkinton (1996); Cossins (1998).

¹³⁹ Cossins and Pilkinton (1996) 226.

¹⁴⁰ Cossins and Pilkinton (1996) 226.

for him to turn up all the time. During the court case he mouthed at me that he knew where I lived...¹⁴¹

There is opinion that any potential risk to safety arising from information sharing can be countered by more appropriate orders to better protect victims.¹⁴² However this may not provide much reassurance to victims who have already struggled to obtain timely and proportionate assistance from police and other services.¹⁴³ WLS NSW regularly assists clients in circumstances where police have not responded appropriately to family violence, including failures to charge perpetrators, apply for AVOs or respond to AVO breaches.

Service providers have also told WLS NSW that they feel at risk when information is shared with a perpetrator. For example, if a perpetrator obtains a copy of counselling notes they may react to what has been written about them and hold the counsellor responsible for turning the victim against them.

Impact of patient exposure to their therapeutic records

The therapeutic relationship between an individual and their counsellor, psychiatrist or psychologist can be damaged when they are exposed to what has been written about them from the therapist's perspective. This exposure can lead to experiencing betrayal of trust, exposure, shame, and violation and they may feel defective, hurt, humiliated or enraged.¹⁴⁴ If the client is currently in the process of treatment when they are exposed to these notes, they will be confronted with 'where they are developmentally and with the therapeutic journey ahead.'¹⁴⁵ If the notes reveal how far they still have to go in their journey to recovery, or portray them as further back than they thought they were in this journey, such exposure may demoralise them and have a serious impact on their motivation and sense of empowerment in the recovery process.

Another risk is that clients may not like the version of themselves that they are exposed to, and this may activate their internal self-criticisms, with damaging effects.¹⁴⁶ They may also dislike the independent voice of the therapist that comes through in clinical notes, which may leave them feeling like the therapist is not competent to be in charge of their care, or may give them the bizarre sense of being 'studied' by the therapist.¹⁴⁷ Clients may feel

¹⁴¹ Cossins and Pilkinton (1996) 226.

¹⁴² Altobelli and Bryant (2014) 204.

¹⁴³ Aboriginal and Torres Strait Islander women report experiencing racism and discriminatory behaviour when dealing with the police: Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experiences of the Courts* (2016) 20; The impact of inappropriate police responses is also felt by migrant and refugee women who report being unable to disclose details of the violence because the police use the perpetrator or members of the perpetrator's family as the interpreter: Judicial Council on Cultural Diversity, *The Path to Justice Migrant and Refugee Women's Experiences of the Courts* (2016) 22.

¹⁴⁴ Bridges, N.A., 'Clinical Writing About Clients: Seeking Consent and Negotiating the Impact on Clients and Their Treatments' (2010) 54(2) *Counselling and Values* 103.

¹⁴⁵ Bridges (2010) 114.

¹⁴⁶ Bridges (2010) 114-5.

¹⁴⁷ Bridges (2010) 110-1.

misrepresented, misunderstood or pathologised by their therapist, and all of this may create a disruption to the therapeutic relationship or process.¹⁴⁸

The impact of this exposure is typically worse for clients in the early stages of psychotherapy, but still raises a potential for harm in clients that have been engaged in the therapeutic relationship for years.¹⁴⁹ If exposure occurs when the client is no longer in treatment, then the effects of such a breach remain unknown, and may impact upon the likelihood of the client returning to treatment with this therapist or seeking treatment with a new therapist.¹⁵⁰

Further, when clients gain access to their records, this can also cause problems in relationships with others who have provided information to the psychiatrist, such as carers.¹⁵¹

Confidentiality of children and young people

Children, like adults, need a safe place to talk about their experiences and feelings. It is recognised that children have greater concerns around confidentiality than adults, and that children may need to receive varied treatment and greater protection as compared to their parents.¹⁵² This suggests that different rules and practices may need to be applied when dealing with children.

This is relevant, for example, where FDR is offered incorporating child inclusive practice (CIP). This practice involves the child in mediation, with the aim of centralising the needs of the child by enhancing each parent's understanding of their child's needs, wants and experiences.¹⁵³ This is done only in cases where both parents give informed consent for an individual child assessment to be conducted by a trained child interviewer, external to the mediation, and to listen to the feedback from these sessions.¹⁵⁴

While research has shown that CIP can lead to better-informed and more durable parenting arrangements,¹⁵⁵ concerns are raised in cases where family violence is involved. This is because of the risks that arise when violent parents are told what their children have shared about the violence they have experienced in their homes, which may lead to the child suffering retaliatory abuse if the parent is upset or angry about these disclosures.¹⁵⁶ Given

¹⁴⁸ Bridges (2010) 107.

¹⁴⁹ Bridges (2010) 112.

¹⁵⁰ Bridges (2010) 106.

¹⁵¹ Levy, Galambos and Skarbek (2014); Vlasios Brakoulias, 'Releasing Medical Records to the Mentally Ill: What About the Carer' (2014) 22 *Australian Psychiatry* 332.

¹⁵² Altobelli and Bryant (2014) 205.

¹⁵³ Shea Hart, A., 'Centralising Children's Needs in Dispute Resolution Family Violence Cases' (2013) 38 *Children Australia* 178.

¹⁵⁴ Shea Hart (2013).

¹⁵⁵ See McIntosh, J.E., Wells, Y.D. and Long, C., 'Child Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post-Separation Adjustment' (2008) 46(1) *Family Court Review* 105 discussed in Hart (2013) 180.

¹⁵⁶ Henry P. and Hamilton, K., 'The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles' (2012) 20(4) *The International Journal of Children's Rights* 584.

that in most cases perpetrators of violence are likely to spend some time with their children, these risks are significant. Practitioners working with children in these contexts need to be specially trained in recognising and managing such risks and deciding how best to go about sharing this information.¹⁵⁷ Further, as Dr Shea Hart has discussed, those working with children in these settings require specialist training to be able to engage the child, as their experiences of trauma effect their willingness to trust and to disclose.¹⁵⁸

Further, a different approach is required when considering the confidentiality of communications by adolescents. As discussed by Duncan, Williams and Knowles, the decisions that psychologists and psychiatrists face in breaching confidentiality are already laced with complex ethical and medical decisions, and '[w]hen clients are minors, the considerations relevant to decisions about confidentiality are different', complicating things further.¹⁵⁹ Such cases typically involve consideration of the risk that adolescents pose to themselves, rather than others, at a time when they are undergoing the social and emotional changes involved in identity formation.¹⁶⁰ These decisions around breaching confidentiality in the context of a therapeutic relationship with an adolescent are also affected by evidence showing that confidentiality is extremely important to adolescents, who are less likely to make disclosures if confidentiality is not assured.¹⁶¹

An important element of this decision, as with all breaches of confidentiality in therapeutic relationships, is the impact that the breach will have on that relationship.¹⁶² As discussed by Sullivan et al, for psychologists who do decide to breach confidentiality in a therapeutic relationship with an adolescent, it is extremely important that all effort is made to ensure that this does not lead to a breakdown of that adolescent continuing to seek therapeutic assistance in the future.¹⁶³ Sullivan et al advise that to do this there must be:

'...open and honest communication from the beginning of therapy, in order to minimise the possibility of the breach having a lasting negative impact on the young person; particularly in relation to interactions with other health professionals in the future.'¹⁶⁴

This is supported in the study conducted by Duncan, Williams and Knowles on breaching confidentiality with adolescent clients, which found that the decision to breach, and the

¹⁵⁷ Henry and Hamilton (2012).

¹⁵⁸ Shea Hart (2013).

¹⁵⁹ Duncan, Williams and Knowles (2012) 210.

¹⁶⁰ Duncan, Williams and Knowles (2012) 211.

¹⁶¹ See studies in Duncan, Williams and Knowles (2012) 211.

¹⁶² Duncan, Williams and Knowles (2012) 217.

¹⁶³ Sullivan, J.R., Ramirez, E., Rae, W.A., Razo N.P. and George, C.A., 'Factors Contributing to Breaking Confidentiality with Adolescent Clients: A Survey of Paediatric Psychologists' (2002) 33 *Professional Psychology: Research and Practice* 396.

¹⁶⁴ Duncan, Williams and Knowles (2012) outlining Sullivan, Ramirez, Rae, Razo and George (2002) at page 217.

process that takes place around the breach, 'have important implications for young people's engagement in therapy both now and in the future.'¹⁶⁵

Confidentiality between children and young people and their lawyers is also a critical issue. When the lawyer is a best interests representative, such as an ICL, the child does not have the benefit of client legal privilege. In NSW the Representation Principles for Children's Lawyers state that even when there is no client lawyer relationship children should still have the protection of a confidential relationship.¹⁶⁶ ICLs are also required to clearly explain the circumstances in which they may or must disclose confidential information in the best interests of the child.¹⁶⁷ If a children's lawyer has a legal obligation to disclose confidential information they should first seek the child's authority to disclose.¹⁶⁸ This is very important as children have reported experiencing repercussions from confidential information being shared with their parents.¹⁶⁹

The courts have also recognised the importance of preserving the confidentiality of therapeutic relationships with children and young people. For example, in *Goldy & Goldy (No 2)* the court was asked to grant leave to issue a subpoena to Kids Helpline. Justice Dawe stated:

2. The Court needs to consider carefully both the usefulness of any information that might be obtained from Kids Helpline and the question of the public interest immunity. ...the Court should be very wary about issuing subpoenas to an organisation which relies upon its confidentiality for its very existence. The benefit of the services provided by Kids Helpline to the children and young people who use that service is significant.
3. ...I am not satisfied that the benefit to the Court in deciding what is in the best interests of the children is outweighed by the public interests in maintaining the confidentiality of the Kids Helpline service.¹⁷⁰

In *Egbert & Egbert* the father had obtained access to the eleven year old child's counselling and medical records. Subsequently the child ceased counselling, as she no longer felt that she could trust the counsellor. In ordering that the father be restrained from contacting the child's future service providers Justice Thornton stated:

183. Having regard to the history of the father contacting professionals and pursuing the disclosure of their records, I am of the view that a restraint upon the father contacting professionals with whom the child communicates is in the child's best interests and would promote her welfare. I am not satisfied that the father's motivation and insistence on obtaining the records of the professionals was entirely

¹⁶⁵ Duncan, Williams and Knowles (2012) 217.

¹⁶⁶ New South Wales Law Society, *Representation Principles for Children's Lawyers* (4th Ed 2014) Principle F1.

¹⁶⁷ Sections 68L and 67ZA FLA; New South Wales Law Society (2014), Principle F2.

¹⁶⁸ New South Wales Law Society (2014), Principle F3.

¹⁶⁹ Bell, F., *Discussion Paper: Facilitating the Participation of Children in Family Law Processes* (2015) Lismore: Southern Cross University 31.

¹⁷⁰ *Goldy & Goldy (No 2)* [2011] FamCA 418 [2]; see also *Bauer & Steggall* [2011] FMCAfam 728 [61].

genuine. No doubt he suspected that the records might provide evidence to support his case. However he does not appreciate the impact on the child of having her confidences betrayed. This would be so, even in the case of a close and trusting relationship between father and daughter, let alone in circumstances such as these, where that relationship has entirely broken down.

184. An order is necessary because of the risk of the child being deterred from obtaining valuable assistance from professionals in the future, in the knowledge that her father may pursue them for her personal information.¹⁷¹

Impact on parenting capacity and gender bias

Victims of family violence can experience things like anxiety, depression, post traumatic stress disorder, substance abuse, self harm and cognitive and behavioural changes, which may affect their capacity to parent.¹⁷² There is also growing recognition of the tactics that perpetrators of family violence use during litigation to intentionally disrupt the mother-child relationship and to pressure victims into consenting to unsafe parenting arrangements.¹⁷³ In this context it is important to consider how relatively unfettered access to therapeutic records may subsequently impact parenting capacity. This can occur if counselling or medical records are selectively summarised or beneficially misinterpreted by perpetrators and/or their legal representatives to characterise a victim mother as lacking insight into their children's needs, exhibiting diminished capacity, being entrenched or fixated, hyper-vigilant, manipulative, over-anxious, neglectful or hysterical. This both obscures the violence and denies the real experiences of victims and children and undermines the mother / child relationship.¹⁷⁴

It is equally important to acknowledge the resilience that many victims of violence demonstrate as they successfully parent through domestic violence¹⁷⁵ and the further harm, including inaccurate assessments of their true caregiving capacity without the presence of violence, that can be done when protective actions are incorrectly viewed as alienating behaviours.

¹⁷¹ *Egbert & Egbert* [2014] FamCA 1064 [183]; See also *Smith & Duke* [2015] FamCA 990 in which Justice Berman dismissed a subpoena issued to a psychologist for records relating to the subject child of the proceedings. Orders had previously been made for reunification therapy on the basis that it would be confidential. Even though the child did not engage in the therapeutic process, His Honour considered the issue of confidentiality and dismissed the subpoena, holding that disclosure should only occur in exceptional circumstances, stating '...it seems important as a matter of public policy that where the parties agree to a process being confidential, that should not likely be the subject of exposure unless the possible advantage either to the child or to the proper of (sic) administration of justice is significant' [52]; *Leroux & Leroux* [2016] FamCA 255 in which Justice Benjamin refused to order the release of notes from the children's treating psychologist as this would '...significantly impact on the therapeutic treatment of these children..' [9].

¹⁷² Roberts, Chamberlain and Delfabbro (2014) 2.

¹⁷³ Hooker, Kaspiew and Taft (2016) 28, 30.

¹⁷⁴ It is positive to see growing recognition of the contentious nature of 'alienation' and a more accurate distinction being made for 'realistic estrangement' in which a child may be appropriately resistant to spending time with a parent because of exposure to family violence, abuse or neglectful parenting: Fidler, B.J. and Bala, N., 'Children Resisting Postseparation Contact with a Parent: Concepts, Controversies and Conundrums' (2010) 48(1) *Family Court Review*, 15-16; Kaspiew, Carson, Qu et al (2015) 89.

¹⁷⁵ Radford and Hester (2006) 27.

WLS NSW believes that there is a strong public interest in the family courts sending a message to the community that they value the opportunity for people to seek support in relation to past and ongoing violence and abuse.¹⁷⁶ There is also a clear public interest in the family courts avoiding interference with an individual's journey to recovery, particularly when disclosures about this process may impact upon the best interests of the child by potentially undermining parenting capacity.¹⁷⁷ As the understanding of the scope and effect of family violence develops, the family law system needs to take responsibility for broader protection of victims of family violence by undertaking a closer examination of the potential impact of breaches of confidentiality on recovery and parenting capacity. It is submitted that such an approach is consistent with the objects and principles of the FLA.¹⁷⁸

His Honour Justice Cronin considered this issue in *Merrill & Burt* in the context of an objection to a subpoena for therapeutic records. In considering the categories of public interest immunity His Honour noted that the categories are not closed and stated:

The general public interest in confidence in therapeutic relationships may not be a recognised category, but the specific interest in protecting the best interests of children – in this case, by maintaining the confidence of a therapeutic relationship which improves the mother's ability to parent the children – may be a category capable of 'recognition'.¹⁷⁹

It may also require some reframing to acknowledge that undermining the therapeutic relationships, which support a parent who is a victim of family violence, is both real harm to the victim parent and also likely harm to the child. This then necessitates consideration of whether greater harm to the child arises from not having access to the material in the sensitive records or from the impact of disclosure of the records on the parenting capacity of the victim parent.

Alternative protections

Professional confidential relationship privilege

In NSW, criminal or civil courts may apply the professional confidential relationship privilege contained in section 126B of the NSW *Evidence Act 1995*, which provides both professionals

¹⁷⁶ Elisabeth McDonald comments on this in the context of New Zealand, writing: '...a complainant's right to privacy and the importance of an effective therapeutic relationship to assist recovery from sexual violence are also important public interests.': McDonald (2013) 12.

¹⁷⁷ In *Jermyn and Carling* [2012] FMCAfam 814 Federal Magistrate Harman, as he was then, excluded notes by a psychologist about childhood sexual abuse stating at 101(d) 'I am satisfied that the release of information as contained within the notes would entirely breach the confidence of the Applicant and would have significant potential for impact upon her psychological and emotional health and would likely cause or potentially cause significant harm to the Applicant as a protected confider. This would be contrary to the principle set out in s.60CA that the child's best interest is the paramount consideration, noting that the Applicant is an equal carer for the children with the Respondent'.

¹⁷⁸ *Family Law Act 1975* (Cth) s 60B.

¹⁷⁹ *Merrill & Burt* [2015] FamCA 159 [38].

and clients with standing to object to the production of evidence of certain confidential communications.¹⁸⁰ The court is required to direct that evidence of protected confidences not be adduced if it is likely that harm may be caused, directly or indirectly, to a protected confider and the nature and extent of that harm outweighs the desirability of those records being made available.

The court must take various factors into account including the probative value of the evidence; the nature and gravity of the relevant offence or the subject matter of the proceeding; the availability of any other evidence; the likelihood of harm arising from adduction; the public interest in preserving confidentiality and the means available to the court to limit the harm that may be caused by disclosure.¹⁸¹

In practice, this privilege has been infrequently relied upon and by examining the experience of psychiatrists, it has been observed that they are frequently served with subpoenas, which would likely be set aside if an examination under section 126B were conducted.¹⁸² As discussed above objections are often not raised due to the burden upon professionals and clients to personally challenge a subpoena. This may involve giving evidence, undergoing cross-examination, and retaining legal representation, which is likely to be difficult and impractical, particularly if they regularly receive subpoenas.¹⁸³ There is also the risk of a costs order if they are unsuccessful, which can be a further deterrence.¹⁸⁴ Some patients are not even aware that their records have been subpoenaed, and so lose this right entirely, with hospitals, and presumably other agencies, lacking universal policies requiring patients to be notified when their records are subpoenaed.¹⁸⁵

As there is no equivalent provision to section 126B in the Commonwealth *Evidence Act 1995*, parties wishing to resist a subpoena for records of a professional confidential relationship in family law matters mainly rely on general law for protection, which can lead to inconsistent outcomes.¹⁸⁶ However there has been some judicial reference to section 126B in family law decisions in NSW under the FLA.¹⁸⁷ The extent to which section 126B applies to NSW family law matters is unresolved, but section 79 of the *Judiciary Act 1903* and section 69ZX(4)(b) FLA are relevant and permit it subject to the best interests of the child being the paramount

¹⁸⁰ The type of professional relationship required is not defined however it might include doctor/patient; nurse/patient; psychologist/client; therapist/client; counsellor/client; social worker/client; accountant/client; private investigator/client and journalist/source: Odgers, S., *Uniform Evidence Law*, (11th Ed Thomson Reuters, 2014) 728.

¹⁸¹ *Evidence Act 1995* (NSW) s 126B(4); *Director General Department of Community Services v D* (2006) 66 NSWLR 582; *X v Commissioner of Police* [2012] NSWSC 930 and *Herrick v Knowles* [2014] NSWSC 1223.

¹⁸² Levy, Galambos and Skarbek (2014).

¹⁸³ Levy, Galambos and Skarbek (2014).

¹⁸⁴ Levy, Galambos and Skarbek (2014) 334.

¹⁸⁵ Levy, Galambos and Skarbek (2014) 334.

¹⁸⁶ Levy, Galambos and Skarbek (2014) 334.

¹⁸⁷ For example, see *Cooper & Cooper* [2012] FMCAfam 789; *Jermyn & Carling* [2012] FMCAfam 814; *Sampson & Hartnett* [2014] FCCA 99; *Kirby & Kirby* [2014] FCCA 2332; *Douglas & Mauldon* [2015] FCCA 2217; *Lusk & Paisley* [2015] FCCA 2631.

consideration.¹⁸⁸ By inference section 126H of the NSW *Evidence Act 1995, Exclusion of evidence of protected sexual assault communications*, could also be an available protection in relevant circumstances in family law matters.¹⁸⁹

The 'without prejudice' protection

At common law communications made during genuine negotiations in an attempt to settle a dispute are prevented from being put into evidence by the without prejudice privilege.¹⁹⁰ This privilege has been enshrined in legislation, such as section 131 *Evidence Act 1995*, which states:

- (1) Evidence is not to be adduced of:
- (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute...¹⁹¹

The protection in section 131 has been judicially considered in relation to FDR, for example, Federal Magistrate Reithmuller, as he was then, stated in *Rastall & Ball & Ors* that:

'26. Importantly, the almost blanket protection provided by Part II of the Family Law Act is not the only protection available to parties. To the extent that a privilege against admissibility of evidence of communications is reasonably required before or after the conduct of family dispute resolution, s.131 of the *Evidence Act 1995* still provides significant protection to the parties...in the style of the common law 'without prejudice' privilege (which is of considerable width in family law matters: see *Rogers v Rogers*)...'¹⁹²

Mathew advocates strongly for a broad application of the without prejudice protection, including at the intake stage of FDR, referring to the decision of Federal Magistrate Reithmuller in *Rastall & Ball & Ors*, but believes that the significant cost and delay involved with raising such an objection means that this would prove an ineffective solution.¹⁹³

¹⁸⁸ See also Reg 12CE *Family Law Regulations 1984*, which states that the *Evidence Act 1995* NSW is a prescribed law for evidence relating to professional confidential relationship privilege for section 69ZX; see also *Northern Territory v GPAO & Ors* (1998) 196 CLR 553: 'The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself' per Gleeson CJ and Gummow J 80.

¹⁸⁹ Relevant circumstances arise when evidence of a protected sexual assault communication is found to be privileged in a NSW criminal proceeding under Division 2 of Part 5 of Chapter 6 of the NSW *Criminal Procedure Act 1986*, the evidence may not be adduced in a civil proceeding to which section 126H applies.

¹⁹⁰ Hardy and Rundle (2010) 176.

¹⁹¹ Section 131 *Exclusion of evidence of settlement negotiations* is a uniform provision in both the Commonwealth and NSW Evidence Acts.

¹⁹² *Rastall v Ball & Ors* [2010] FMCAfam 1290 [26].

¹⁹³ Mathew (2011) 217.

Part 3 Conclusion and proposals

Conclusion

A genuine commitment to improving responsiveness to victims of family violence must include preserving the integrity of therapeutic relationships. The detrimental impact of disclosure of confidences must not be ignored or put in the too hard basket. There must be a common understanding of what constitutes safe and appropriate information sharing amongst family violence service providers and in the family law context, with opportunity to access equivalent protections whenever sensitive material is sought as evidence.

Ideally accessing counselling or therapeutic records should be the last resort and only used when required in the best interests of the child, including urgency, or there is a relevant and significant fact in issue that cannot otherwise be proven.

At the very least, there is a need for clarity around how subpoenas can and will be used in the context of therapeutic relationships. At present there is great confusion amongst both clients and practitioners. If the family courts are to continue facilitating access to such sensitive material, then the means of access should at least be 'both predictable and justifiable',¹⁹⁴ though the role of judicial discretion in family law matters is recognized. It is also acknowledged that best practice guides in and of themselves do not ensure best practice.¹⁹⁵

In summary the key concerns held by WLS NSW include:

- Recognising that there are limits to information sharing, it is not a panacea and will not solve systemic problems such as delays or inexperience in responding to family violence;
- The lack of consensus about and commitment to what constitutes good and safe information sharing, which must be based on family violence and trauma informed principles and aim to be consistent, minimally intrusive, proportionate, culturally appropriate and respectful of agency;
- The apparent lack of understanding about the significant variations in the FDR experience depending on the choice of FDR provider and the resulting inconsistency and inequity in the scope of the protection offered by sections 10H and 10J FLA, particularly with respect to intake;
- The inconsistency in the family law litigation treatment of sensitive records, such as the protections available for section 10B FLA family counselling records compared with the access to and use of other types of counselling records;

¹⁹⁴ McDonald (2013) 12.

¹⁹⁵ Breckenridge and Hamer (2014) 9, who also note Laing et al '...over-reliance on strict guidelines can sometimes lead to simplification of the complex and fluid nature of DFV service provision' 8.

- The need for genuine commitment to preserving the confidentiality of sensitive records for reasons of safety, therapeutic integrity and the protection of victims from the misuse of court processes by perpetrators aiming to harm, intimidate and undermine their recovery and parenting capacity; and
- Ensuring that victims of family violence have safe and equal access to all family law pathways, including greater emphasis on protections for victims when they are forced to come into contact with the court process.

Proposals

Information Sharing

Proposal 1

Utilise victim centric practices that acknowledge that informed consent is the cornerstone of safe and appropriate exchange of information.

Proposal 2

Shift the focus from information sharing to efforts to improve responsiveness to disclosures of family violence and prevention.

Therapeutic records

Proposal 3

The addition of a new principle in 60B FLA that confidential therapeutic services are recognised as an important aspect of individual support and recovery and also as a means of building parenting capacity.

Proposal 4

Develop guidelines for self represented litigants (and lawyers) on drafting affidavits about family violence, safety concerns and impact on parenting capacity to improve the quality of primary evidence of family violence, which could reduce the need to rely on third party material.

Proposal 5

Undertake further research into the impact of disclosure of sensitive information for specific groups, including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people, people identifying as LGBTIQ and people with disabilities.

Proposal 6

Develop guidelines and training to assist the judiciary and family law professionals to approach the issue of access to therapeutic records with sensitivity and to encourage a shared responsibility for the safety of victims and their children.

Subpoenas

Proposal 7

Therapeutic records be subpoenaed and produced by following a guided, preferably prescribed, decision-making process to establish the necessity and importance of accessing these documents. The potential for further delay in proceedings is acknowledged, but in the absence of urgency the consequences of disclosure outweigh any delay.

Proposal 8

The decision making process about access to therapeutic records, whether ideally contained in the court rules or in the form of guidelines like the Family Violence Best Practice Principles, might include the following:

- A presumption that there is always potential for a detrimental impact on the therapeutic relationship when sensitive records are accessed, particularly in a litigation context.
- Clarification of the type of sensitive records to be protected.
- Acknowledgement that parties can seek production of their own therapeutic records with restrictions on access by a perpetrator as required.
- A requirement to seek leave to issue a subpoena for therapeutic records, reversing the onus from parties and professionals who would typically object to the subpoena production to the party seeking access, including ICLs. Parties retain the right to object to production even if leave is granted to issue the subpoena.
- A standard that leave to issue a subpoena only be granted if the records appear to be relevant to a fact in issue and there is no less intrusive source of the evidence available or there are circumstances of urgency, which may need to be defined.
- If records about therapeutic interventions with children are sought, the court must consider whether the consent of the child must be obtained or if an additional protection is required, such as the records only being viewed by the judge.
- Acknowledgement that evidentiary rules will be relevant to the consideration of legitimate forensic purpose.

- A requirement for parties inspecting therapeutic records to sign an undertaking pursuant to 15A.12(2) as discussed in *Sampson & Hartnett* [2014] FCCA 99 at 19-20.

Proposal 9

Include counselling records in Rule 15.30(2)(b) *Family Law Rules 2004* and in Rule 15A.13(2)(b) *Federal Circuit Court Rules 2001*.

Proposal 10

Establish a service, similar to the SACP Service, to provide advice and representation for individuals and services wishing to object to subpoenas of therapeutic records in family law matters.

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